1* District Court of the United States for the District of Columbia

Criminal No. 73806

UNITED STATES OF AMERICA

v

ROBERT FRAZIER, DEFENDANT

WASHINGTON, D. C.,
Wednesday, October 9, 1946.

The above-entitled matter came on for hearing before Associate Justice Henry A. Schweinhaut.

3 PROCEEDINGS

The DEPUTY CLERK. *United States* v. *Robert Frazier.*

The following members of the jury panel took their seats in the jury box: Mrs. Florence H. Crawford, Charlotte E. Jones, James J. Lawlor, John C. Lazarus, William T. Mack, Mrs. Marjorie E. Merrick, George M. Montgomery, Mrs. Catherine N. Moody, Alexander Moore, William O. Parker, Walter A. Robinson, Joseph Rode.

Mrs. STILES. May it please the Court, ladies and gentlemen of the panel, the case we are about to try is one in which the defendant, Robert Frazier, is charged in the indictment with the violation of Section 2553 (a) of the Internal Revenue Code, which prohibits the purchase, sale, dispensing and distributing of certain narcotic drugs, and by the indictment he is charged with violation of this section of the Federal Code.

The defendant is seated at counsel table, and his counsel is Mr. Edward Buckley, who is seated by his side.

4 I think you know I am Mrs. Stiles, from the U. S. Attorney's office.

The Government will call certain witnesses.

Does your Honor wish me to call these witnesses at this time?

The COURT. I do not care whether you do or not. Mr. Buckley perhaps does.

Mr. BUCKLEY. I would suggest or ask that she call them.

Mrs. STILES. Very well.

*Indented numbers indicate transcript pages.

Ladies and gentlemen of the panel, I wish you to look at these people as they stand: Officer Ralph W. Harper, Officer L. B. Frye, Officer W. L. Taylor, Mr. Charles W. Cannon, Mr. Raymond Holt, Mr. Ellis J. Spiker, Mr. Vernon O. Trygstad, of the Narcotic Bureau, L. Morrison, of the Narcotic Bureau, Mr. Lee E. Wardell, Mr. Guthrie L. Jones.

Neither of these witnesses is present at the present time, ladies and gentlemen of the panel, but they will be here: Mr. Albert B. Ground, of the Federal Bureau of Investiga-
5 tion. Dr. Albert A. Spear.

Ladies and gentlemen of the panel, do any of you know the defendant in this case?

(No response.)

Mrs. STILES. Do any of you know Mr. Buckley, his counsel?

(No response.)

Mrs. STILES. Do any of you know me?

(No response.)

Mrs. STILES. Do you know any of these witnesses whose names I have called and who have stood or those who have not stood?

Mrs. CRAWFORD. Yes, ma'am. I know Mr. Ground.

Mrs. STILES. How do you know him? Socially or in a business way?

Mrs. CRAWFORD. Business.

Mrs. STILES. Where do you work, may I ask you.

Mrs. CRAWFORD. FBI.

Mrs. STILES. Would your working in the FBI and Mr. Ground's working in the FBI influence your decision in this case, or could you render your decision based solely upon the evidence?

Mrs. CRAWFORD. I don't believe that it would make any difference; I don't know.

The COURT. Would it embarrass you to sit in a case in
6 which he is a witness?

Mrs. CRAWFORD. No.

The COURT. Do you think his testimony is likely to influence you more than that of some other witness?

Mrs. CRAWFORD. Well, I don't know.

The COURT. I am inclined to think that perhaps we had better excuse you for this case, because it may worry you while you are sitting in the box, and that is not a good idea.

I will excuse you without requiring a challenge.

The DEPUTY CLERK. Benjamin Root, will you take seat number one in the jury box?

Mrs. STILES. Did you hear the questions I asked of the others? Did you hear the questions which I asked about any of the parties? Do you know any of them?

Mr. ROOT. No.

Mrs. STILES. Do any of you know why you cannot sit upon this jury and render a fair and impartial verdict purely upon the evidence which is presented, applying to it the law which is given to you by His Honor?

(No response.)

Mrs. STILES. Hearing no answer to that question, I take it your answer is no.

Mr. BUCKLEY. How many of the prospective jurors are employed in the Federal Government?

(Jurors indicated by raising hands.)

7 Mr. BUCKLEY. Would any of you prospective jurors have any prejudice of any kind against any defendant who might be charged with violation of the narcotic law or the Narcotic Act?

(No response.)

Mr. BUCKLEY. Are any of you immediately related to any member of the Metropolitan Police Department or any member of the Federal Bureau of Investigation or any narcotic law enforcement officer?

(No response.)

Mr. BUCKLEY. Would any of you jurors give more weight or credence to the testimony of a police officer than you would to any other civilian?

(No response.)

Mr. BUCKLEY. I take it from your silence you answer would be no.

Mrs. STILES. The Government is satisfied with the jury.

Mr. BUCKLEY: Number 5.

The DEPUTY CLERK. William T. Mack, you are excused from serving on the panel.

Miss Mary B. Staves, will you take seat number 5 in the jury box?

Mrs. STILES. Did you hear the questions I asked the other members of the panel? Do you know any of the parties whose names I have called?

8 (No response.)

Mrs. STILES. Do you know of any reason why you cannot sit on this jury and render a fair and impartial verdict upon the evidence and the law which His Honor will give you?

(No response.)

Mrs. STILES. The Government is satisfied with the jury.

Mr. BUCKLEY. Number 7.

The DEPUTY CLERK. George M. Montgomery, you are excused from serving on this panel.

Herman F. Stames, will you take seat number 7 in the jury box?

Mrs. STILES. Did you hear the questions I asked the other members? Do you know any of the persons whose names I have called?

(No response.)

Mrs. STILES. Do you know of any reason why you cannot and should not sit upon this jury and render a fair and impartial verdict upon the evidence?

(No response.)

Mrs. STILES. The Government is satisfied.

Mr. BUCKLEY. Number 10.

The DEPUTY CLERK. William O. Parker, you are excused from serving on this panel.

James L. Davis.

Mr. DAVIS. I happen to know two gentlemen on there.

9 The COURT. Come around, anyway. They may be very happy to have you in spite of that.

Mrs. STILES. You say you know two of the witnesses?

Mr. DAVIS. That is right.

Mrs. STILES. Which two?

Mr. DAVIS. Mr. Spiker I have worked with, and with Officer Taylor.

Mrs. STILES. Would your knowing these gentlemen influence your decision in this case?

Mr. DAVIS. Well, I would have to hear the evidence first. I would rather not be embarrassed.

Mrs. STILES. You feel you would be embarrassed.

Mr. BUCKLEY. I submit, if Your Honor please, if the gentleman might be embarrassed by a decision later, Your Honor can challenge him for cause.

The COURT. I suppose I should. All right, Mr. Davis.

The DEPUTY CLERK. Mr. Davis, you are excused from serving on this panel.

Anna S. Gorman, will you take seat number 10 in the jury box?

Mrs. STILES. Did you hear the questions I asked, Mrs. Gorman?

Mrs. GORMAN. Yes.

Mrs. STILES. Do you know any of the persons whose names I called?

(There was no response.)

Mrs. STILES. Do you know of any reason why you cannot render a proper verdict based on the evidence and the law?

(No response.)

Mrs. STILES. The Government is satisfied.

Mr. BUCKLEY. Do any of you jurors now impaneled have any prejudice against anyone who might be charged with a violation of the narcotic law?

(No response.)

Mr. BUCKLEY. Are any of you jurors related to any member of the Metropolitan Police Department or a narcotic agent?

(No response.)

Mr. BUCKLEY. Are any members of your immediate family employed in the Treasury Department?

Mr. BENJAMIN ROOT. My wife is in the Treasury Department.

Mr. BUCKLEY. What branch of the Treasury Department?

Mr. ROOT. Secretary's office.

Mr. BUCKLEY. Number 11.

The DEPUTY CLERK. Walter A. Robinson, you are excused from serving on this panel.

James H. Stanmore.

Mrs. STILES. Have you heard the questions I asked? Do you know any of the persons whose names I have called?

Mr. STANMORE. I know the defendant.

Mrs. STILES. Do you know him socially?

11 Mr. STANMORE. I have been knowing him for some time.

Mrs. STILES. Your Honor, I think that is cause for this man.

The COURT. I do not think that ipso facto is enough to exercise that. I do not think it is ample cause.

Do you think you can give the defendant and the Government a fair trial notwithstanding your acquaintance with the defendant in this case?

Mr. STANMORE. I can, sir.

The COURT. All right. I won't take action.

Mrs. STILES. Number 11.

The DEPUTY CLERK. James Stanmore, you are excused from serving on the jury panel.

Clarence A. Vogle, take seat number 11 in the jury box.

Mrs. STILES. Did you hear the questions I asked the other members of the panel? Do you know any of the parties whose names I have called?

(No response.)

Mrs. STILES. Do you know of any reason why you cannot sit and render a fair and impartial verdict based on the evidence and the law as given to you by your Honor?

Mr. VOGLE. No.

Mrs. STILES. The Government is satisfied.

Mr. BUCKLEY. What is your occupation?

Mr. VOGLE. I am linoleum salesman for asphalt tiling.

12 The COURT. I did not hear you. Salesman?

Mr. VOGLE. Yes, sir; for asphalt tiling.

The DEPUTY CLERK. Clarence A. Vogle, you are excused from serving on this panel.

Jason E. Barr, will you take seat number 11 in the jury box?

Mrs. STILES. Have you heard the questions I asked? Do you know any of the parties whose names I have called?

(No response.)

Mrs. STILES. Do you know of any reason why you cannot render a fair and impartial verdict based on the evidence and the law which will be given you by His Honor?

(No response.)

Mrs. STILES. The Government is satisfied.

Mr. BUCKLEY. Number 12.

The DEPUTY CLERK. Joseph Rode, you are excused from serving on this panel.

Paul D. M. Leman, take seat number 12 in the jury box.

Mrs. STILES. Did you hear the questions I asked the other members of the panel?

Mr. LEMAN. Yes.

Mrs. STILES. You saw the persons who stood and you heard the names I called. Do you know any of those parties?

Mr. LEMAN. No.

Mrs. STILES. Do you know of any reason why you
13 cannot sit on this jury and render a fair and impartial verdict based on the evidence, applying to it the law that will be given to you by His Honor?

Mr. LEMAN. No.

Mrs. STILES. The Government is satisfied.

Mr. BUCKLEY. Number 6.

The DEPUTY CLERK. Mrs. Marjorie E. Merrick, you are excused from serving on this panel.

Margaret T. Lorenz, will you take seat number 6 in the jury box?

Mrs. STILES. Did you hear the questions I asked the other members of the panel?

MARGARET T. LORENZ. I did.

Mrs. STILES. You saw the persons who stood and whose names I called?

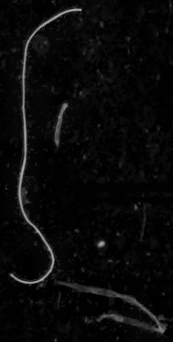
MARGARET T. LORENZ. Yes, ma'am.

Mrs. STILES. Do you know any of the parties that I called?

MARGARET T. LORENZ. No.

Mrs. STILES. You heard the questions that I have asked the other people sitting on this jury about rendering a fair and impartial verdict. Can you do that?

MARGARET T. LORENZ. Yes.



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Mrs. STILES. The Government is satisfied.

Mr. BUCKLEY. Number 8.

14 The DEPUTY CLERK. Mrs. Catherine N. Moody, you are excused from serving on this panel.

The COURT. We will recess for five minutes.

(A short recess was had.)

The COURT. We have a shortage of jurors. We are unable now to fill the box, because the jurors in the other courts are all temporarily engaged. We are quite certain to have them by 1:30.

I have a meeting in my office that I had arranged for today, which will keep me tied up until perhaps 2:30, so I think the only safe thing to do is to adjourn now until 2:30, and we will have jurors by that time.

You will be excused until 2:30.

I will have to ask you folks to return at 2:30. I think perhaps we can let you go then. Those of you who are members of the civil jury panel can be excused until the usual time and usual place tomorrow morning.

* * * * * *

15 Mr. BUCKLEY. If your Honor please, I have made a little investigation of the impaneling or selection of this panel here as well as selection of the other panels sitting this month, and I most respectfully submit that the method and procedure used in selecting is irregular, and I am going to move to strike this whole panel, the reason being this: that from the inquiries I have made, there were about five hundred or five hundred and a few jurors subpenaed—that is, individually subpenaed to appear here—from which they selected a sufficient number of jurors here.

If there were five hundred, they were divided into two groups, two hundred fifty for one court and two hundred fifty for another court, and of the two hundred fifty for each court, they were asked how many of those two hundred fifty did not desire to serve as jurors, to raise their hands, so those who raised their hands were told to step to one side, and out of the remaining number that were left they picked the jurors, and the remaining number that were left consisted mostly of Gov-

ernment employees and housewives, and unemployed. There are only a few unemployed.

16 I know Your Honor has read this case in the Supreme Court, *Thiel* v. *Southern Pacific Company*. This is not a proper cross-section.

The COURT. The *Thiel* case holds that it must be shown that there was a systematic attempt to exclude a certain type or group of persons.

Mr. BUCKLEY. It says no matter how much it was done in good faith, to keep from harming or injuring people——

The COURT. Good faith or otherwise, there has to be a systematic attempt to exclude a certain type or group of individuals. That is what that case holds, and that is not the situation here.

Mr. BUCKLEY. When those individuals are asked to step to one side, those who do not want to serve, they do not even give any reason. It could easily be that there could be people who are making a wage who, if they sat here, could not afford to get by on four dollars a day, which is the same principle that is in this case. We do not know what their reason is. There is no reason given.

The COURT. I am going to deny the motion. You can bring that up in a motion for a new trial if the defendant is convicted. I will deny it now.

Mr. BUCKLEY. I reserve my point.

The COURT. I am not passing on this at this time, but it may be that if you have merit in your position at all,

17 you are too late to raise it at trial time.

Mr. BUCKLEY. No. I have cases on that. Even if it is before the jury, you can raise it in your motion to arrest judgment.

The COURT. That is the way it rests. I will deny it at this time. Are you ready to proceed?

Mr. BUCKLEY. Yes.

(Counsel for both sides resumed their places at the trial table, and the following occurred.)

The DEPUTY CLERK. James A. Longmore, take seat number 8 in the jury box.

Mrs. STILES. May it please the Court: Were you in the room and did you hear the questions I asked the other members of the panel?

The COURT. I do not think any of these jurors did.

Mrs. STILES. Then I will identify the case again.

The COURT. You will have to identify the case again.

Mrs. STILES. This defendant, whose name is Robert Frazier, is charged with violation of the Harrison Narcotic Act, alleged to have occurred in the District of Columbia on the 19th day of April 1944.

He is seated at counsel table, and beside him is seated his counsel, Mr. Edward Buckley.

My name is Mrs. Stiles. I am from the United
18 States Attorney's office and will present the case for the Government.

The Government will call certain witnesses, all of whom may not at this time be in the room, Your Honor, but I will call their names: Officer Ralph W. Harper, Officer W. L. Taylor.

Will you listen to these names and see whether you know the names of the witnesses? Raymond Holt, Guthrie L. Jones, Dr. Albert A. Spear, Officer L. B. Frye, Charles W. Cannon, Ellis J. Spiker, Vernon O. Trygstad, of the Narcotic Bureau, A. L. Bendon, of the Narcotic Bureau, Mr. Albert B. Ground, of the Federal Bureau of Investigation. Do you know any of these persons whose names I called?

Mr. LONGMORE. No.

Mrs. STILES. Do you know the defendant or his counsel?

Mr. LONGMORE. No.

Mrs. STILES. Or do you know me?

Mr. LONGMORE. No.

Mrs. STILES. Do you know any reason why you can-
19 not sit upon this jury and render a fair and impartial verdict upon the evidence and apply to it the law which will be given you by His Honor? I take it your answer is no—that you know of no reason?

Mr. LONGMORE. Yes.

Mrs. STILES. The Government is satisfied.

Mr. BUCKLEY. Are you related to any member of the Metropolitan Police Department?

Mr. LONGMORE. No.

Mr. BUCKLEY. Are you related to any narcotic enforcement officer?

Mr. LONGMORE. No.

Mr. BUCKLEY. What is your occupation?

Mr. LONGMORE. Street car operator.

Mr. BUCKLEY. Do you have any prejudice against anyone who might be charged with violation of the Narcotic Act?

Mr. LONGMORE. No.

Mrs. STILES. The Government is satisfied with the jury.

Mr. BUCKLEY. Number 10.

The DEPUTY CLERK. Anna S. Gorman, you are excused from serving on this panel.

William E. Brown, will you take seat number 10 in the jury box?

Mrs. STILES. Did you hear the questions I asked the other gentleman?

Mr. BROWN. Yes, I did.

Mrs. STILES. Do you know the parties? Do you know the defendant or his counsel?

Mr. BROWN. No.

Mrs. STILES. Do you any of the persons whose names I have called?

Mr. BROWN. No.

Mrs. STILES. Do you know of any reason why you cannot sit on this jury and render a fair and impartial verdict upon the evidence that will be presented, applying to it the law as it will be given to you by His Honor?

Mr. BROWN. No.

Mrs. STILES. The Government is content.

Mr. BUCKLEY. Number 8.

The DEPUTY CLERK. James A. Longmore, you are excused from serving on this panel.

Floyd F. Grayson, take seat number 8 in the jury box.

Mrs. STILES. Did you hear the questions I asked the other gentleman?

Mr. GRAYSON. Yes.

Mrs. STILES. Do you know any of the parties whose names I called?

Mr. GRAYSON. I do not.

Mrs. STILES. Do you know the defendant of his counsel?

Mr. GRAYSON. I do not.

21 Mrs. STILES. Do you know of any reason why you cannot sit upon this jury and render a fair and impartial verdict upon the evidence and apply to it the law as it will be given to you by His Honor?

Mr. GRAYSON. I do not.

Mr. BUCKLEY. Are you related to any member of the Police Department?

Mr. GRAYSON. I am not.

Mr. BUCKLEY. Or any narcotic agent?

Mr. GRAYSON. No.

Mr. BUCKLEY. As the jury is now impaneled, how many of the prospective jurors are employed by the Government?

(Each of the twelve persons in the jury box raised a hand.)

Mrs. STILES. The Government is content.

Mr. BUCKLEY. If Your Honor please, may we approach the bench?

(Counsel for both sides approached the bench, and the following occurred:)

Mr. BUCKLEY. If Your Honor please, with reference to the motion which I made a while ago, moving to strike the whole panel, I now find myself in this position. I have exhausted my ten challenges.

In selecting these different panels on the first Tuesday of the month, the Clerk says to the five hundred or two hundred fifty, whichever it may be, individuals who are sum-

22 moned to appear here, from which to pick the juries, "All those who do not desire to serve, step to one side."

That leaves a batch of Government employees and housewives.

Now, I have exhausted my ten challenges, and here I have twelve Government jurors who are to decide this defendant's case, which is a violation of the Federal statute, being brought in a Federal Court, prosecuted by a Federal prosecutor, and the

case is presented by Federal agents. I submit there is reason to challenge these people for cause.

The COURT. I will deny the motion and request at this time that you take it up later, in a motion after the verdict, if you think it is sound. I do not believe your motion is sound. Chance has resulted in this jury panel of twelve being composed of Government employees, but the jury list from which they by chance were selected is a mixture of Government employees and private employees.

Mr. BUCKLEY. But the selection of the different panels of twenty-six I submit consisted of an irregularity. I can show Your Honor a case that where there is an irregularity, it is prejudicial to the defendant.

The COURT. I presume you are making it after the twelve are selected and you have exhausted your challenges. I make the same ruling as I did before. Is there anything else?

23 Mr. BUCKLEY. That is my motion at this time.

The COURT. Very well.

(Counsel for both sides resumed their places at the trial table, and the following occurred:)

(The following named persons were duly sworn as the jurors in this case: Benjamin Root, Charlotte E. Jones, James J. Lawlor, John C. Lazarus, Mary B. Staves, Margaret T. Lorenz, Herman F. Stames, Floyd F. Grayson, Alexander Moore, William E. Brown, Jason E. Barr, Paul D. N. Leman.)

The DEPUTY CLERK. All witnesses in the case of Robert Frazier will retire to the witness room immediately.

The COURT. Proceed.

OPENING STATEMENT ON BEHALF OF THE UNITED STATES OF AMERICA

Mrs. STILES. May it please the Court, ladies and gentlemen of the jury, the defendant in this case is charged

24 with a violation of the Harrison Narcotic Act, specifically Section 2553 (a) of that Act. The indictment in this case reads:

"That one Robert Frazier on, to wit, the 19th day of April 1944, and at and within the District of Columbia aforesaid,

did then and there violate a requirement of Section 2553 (a) of the Internal Revenue Code in that he, the said Robert Frazier, did then and there, knowingly, wilfully, unlawfully, and feloniously, purchase, sell, dispense, and distribute a certain narcotic drug, to-wit, 19 one-half grain syrettes of morphine tartrate, and 20 one-half grain codeine sulphate tablets, which said narcotic drugs were not then and there in or from the original stamped package containing said narcotic drugs, against the form of the statute in such case made and provided, and against the peace and Government of the said United States."

I would like to say first, ladies and gentlemen of the jury, that there is one portion of this indictment that the Government is abandoning; in other words, the Government has come to the conclusion that it does not have sufficient evidence to present to you to support that part of the indictment. That is in connection with the 20 one-half grains of codeine sulphate tablets; so our case will be based upon the alleged violation of the statute in connection with 19 one-half grain syrettes of morphine tartrate.

Ladies and gentlemen of the jury, the Government will present evidence to show that on the day alleged in the indictment, the 19th day of April 1944, the defendant was arrested and that he had on his person at that time narcotics which I have just named, the syrettes, the 19 one-half grain syrettes of morphine tartrate.

He had these in a box in his pocket, and he secured the permission of the arresting officer to go to the men's room in the filling station in the vicinity where he was arrested; that while in that men's room he deposited this box containing these narcotics in a wastebasket in that room. I am not going into detail as to the evidence, but that is roughly what the evidence will show.

If we show you that he did have in his possession these syrettes of morphine tartrate, then we will have shown you, ladies and gentlemen of the jury, that he has violated this statute which the indictment says he has violated.

I want you to follow very closely the evidence in the case, and I am sure you will, so I will not go into detail as to how we will present this evidence.

Mr. BUCKLEY. I will reserve our opening statement. Thereupon——

RALPH W. HARPER was called as a witness, and, being first duly sworn, was examined and testified as follows:

Direct examination by Mrs. STILES:

Q. Will you state your full name for the record, please, Officer?

A. Ralph Waldo Harper.

Q. Are you attached to the Traffic Division of the Metropolitan Police?

A. At that time I was; yes.

Q. That is, on the 19th of April 1944?

A. That is correct.

Q. Now, directing your attention to that date, Officer, did you see the defendant in this case, Robert Frazier?

A. I did.

Q. Will you tell these ladies and gentlemen of the jury the circumstances under which you saw him and just what occurred?

A. He was arrested driving a Cadillac automobile for speeding, and I was riding a motorcycle at the time.

Mr. BUCKLEY. Keep your voice up, Officer, please.

The WITNESS. He was stopped and I requested his operator's permit.

He stated he didn't have a permit, and I requested his registration card for the car; took him to the patrol box on the southeast corner of Minnesota Avenue and Benning Road; called the traffic records to check to see whether he had a permit or not.

In checking I found that he did not have a valid D. C. permit.

He was charged with those offenses.

By Mrs. STILES:

Q. Then what, if anything, occurred at that time, Officer?

A. As soon as I told him——

By Mr. BUCKLEY:

Q. Officer, did you say he was charged with those offenses?

A. That is correct.

When I had him at the box he requested to go to the toilet, and when I asked him for his registration card he had already gotten off of the car, and as he reached back—he was wearing his topcoat, and as he reached back toward his hip pocket to get his billfold out of his pocket I saw a large white box—what appeared to be a large white box in his left side pocket. As he pulled his coat back, was unbuttoning it, it showed sort of a flap where I noticed it. Right then he requested to go to the toilet right away. I granted him permission to go into the toilet.

By the COURT:

Q. Where were you then?

A. We were at the box.

Q. In the street?

28 A. At the corner; yes, sir. The gas station is on that corner and the box is right in front of the station.

Q. He went into the toilet in the gas station?

A. He went into the gas station. Officer Frye was standing there at the time. When he came back out I noticed immediately that the box was gone out of his pocket. I called Officer Frye and told him to go search the toilet right away and see if he could find the box in there that was similar to this box.

He goes into the toilet and he comes back with a box that was similar to the box I had seen; but I went back into the toilet myself, in company with Officer Frye, and we searched the toilet all over.

I didn't find another box. It wasn't in there.

He was placed in the patrol wagon and was sent to No. 11 Precinct. Officer Frye and I opened the box and examined it in the station——

By Mrs. STILES:

Q. Will you speak up, Officer? I do not know whether these jurors can hear.

Mr. BUCKLEY. I can't hear him.

By Mrs. STILES:

Q. Speak as loud as you can.

A. I sent him in the wagon to the station. I kept
29 the box that we had recovered in the toilet in my possession until we got to No. 11 Precinct Station.

When we got to No. 11 Precinct Station I delivered the package to Sergeant Taylor, on our Narcotic Squad, and two agents from the Narcotic Bureau in the presence of the defendant. He denied all knowledge of having the box or the box being his property whatever. He was charged then. That's about all there is to it.

Q. Officer, you say you turned this over to Sergeant Taylor in the presence of two narcotic agents there?

A. That is correct.

Q. Who were those agents?

A. Bendon and Trygstad.

Mrs. STILES: Mr. Clerk, will you mark this Government Exhibit No. 1 for Identification?

(The document was marked "Government Exhibit 1" for Identification.)

The COURT. While that is being done, will you come up to the bench? I do not need you, Mr. Reporter.

(After a conference at the bench, the reporter was called and the following occurred at the bench:)

Mr. BUCKLEY. In Mrs. Stiles' opening statement it is my understanding that she informed the Court and the jury that
30 she was going to abandon that portion of the count which refers to 20 one-half grains of codeine sulphate tablets. That is correct?

Mrs. STILES. Yes.

Mr. BUCKLEY. Because of the fact that there were stamps on them?

Mrs. STILES. No. I said because we had insufficient evidence.

Mr. BUCKLEY. Because of insufficient evidence.

Mrs. STILES. Regarding that particular part of the indictment.

Mr. BUCKLEY. I object to that, and state as my reason for the objection that the description of the articles is joined by the conjunctive and by abandoning one portion of it the Gov-

ernment is attempting to change the indictment as returned by the grand jury.

The COURT. I will overrule the objection, for the reason that I think that one can translate what Mrs. Stiles said and put it another way and say in effect to the jury that the Government would be unable to prove all that it had alleged in the indictment with respect to quantities of narcotics. Therefore, if she proves anything which constitutes an offense and which is encompassed within the indictment, it will be sufficient.

Mr. BUCKLEY. Now, when it comes to cross-examination of these witnesses, will I be permitted to cross-examine
31 those witnesses on this portion that she is attempting to abandon? My purpose is that is my understanding that they did have stamps. Is that correct? Or am I wrong?

Mrs. STILES. That they did have?

Mr. BUCKLEY. Yes; that they did have stamps.

Mrs. STILES. Yes; that particular quantity did have.

The COURT. I will rule on that when it comes.

* * * * *

32 By Mrs. STILES:

Q. Officer, I show you Government Exhibit No. 1
33 for Identification, which appears to be a box broken down, and ask you if you have ever seen that before [handing an article to the witness]?

A. That appears to be the box we found in the toilet. It is not exactly the way we had——

By the COURT:

Q. I can't hear you.

A. I say, that appears to be the box we had, but it had a back on it, and here is where I initialed it at 3:30 p. m., 4-19-44—that was the date—in the No. 11 Precinct Station House, in the presence of the defendant and Sergeant Taylor, the other officers, and myself.

Q. You did not break up the box?

A. No, sir. All these papers were on the box, but they were taken off the box for test later on. The last time I saw the box it was white, but these are the numbers and the initials that I printed on there that evening at No. 11.

By Mrs. STILES:

Q. I understand you mean that these white pieces are the coverings on this box that have since been removed?

A. That is correct. You notice they fit the sides [indicating].

Q. I see; yes [indicating].

A. And this is the back and the top, which I do know are the ones I initialed.

34 By the COURT:

Q. If I understand correctly, the original condition of the box was that cardboard with white paper around it?

A. That is right; with these wrappers around it on all sides. It would be just like that on the sides [indicating].

By Mrs. STILES:

Q. Officer, you say you examined this box. What did it contain?

A. It contained 19 small tubes, 4 boxes, a matchbox with 2 hypodermic needles, a small hypodermic syringe, and a bottle or 2 bottles of some kind of tablets, which later proved to be codeine and morphine. At the time I didn't know—I wasn't an official on that—didn't know what was in them.

Q. I show you Government Exhibit 1-A for Identification, which appears to be four small boxes. Will you tell me if you have ever seen them before [handing articles to the witness]?

A. That is correct. Those are the boxes that were in there and contained 19 small tubes with little needle points on them.

42 Q. Was that the time that you questioned him about the box?

A. I didn't question him about the box at all. I called—as soon as I got to the station I called the Narcotic Bureau and called them to send somebody there, and as soon as they came over I gave them the box and contents. Then he was questioned by them in my presence at No. 11 Precinct.

Q. And the agents that came over there were there while you were there; they arrived while you were still at the station?

A. That is correct.

Q. In your presence who questioned him about the box?

A. He was questioned by all three. Different questions were asked him by each one of the narcotic men. I don't remember which ones asked him which questions or which ones
43 were asked at the time.

* * * * * * *

Q. Do you remember the questions that were asked him?

A. He was asked if they were his. That was one of the questions, and he denied emphatically that he had ever seen the box or had anything to do with the box whatsoever.

* * * * * * *

47 Q. Mr. Harper, directing your attention to Government Exhibit marked "1–A" for Identification, are these the boxes that the little tubes were taken from?

A. That is correct.

Q. And these four boxes here are all similar and alike?

A. That is correct.

Q. Directing your attention to one of these four boxes,
48 marked "Government Exhibit 1–A" for Identification, will you read, for the purpose of the record, what it says on that box? They are all alike, I presume?

A. Yes. "Produced by E. R. Squibb & Sons for U. S. Army medical purposes."

Mrs. STILES. Will you read louder, Officer?

The WITNESS. That one is kind of marked out. "Produced by E. R. Squibb & Sons for U. S. Army Medical Department. Morphine used was property of United States Government."

It is kind of marked out. I can't read it to make it exactly. "Produced by E. R. Squibb & Sons for U. S. Army Medical Department. Morphine used was property of U. S. Government."

By Mr. BUCKLEY:

Q. On the other side of the box is there a serial number of some kind?

A. "Control; 3D. 41007."

Q. Do you know of your own knowledge what that serial number signifies or indicates?

A. No; I do not.

Q. With reference to that portion on there which says, "Manufactured by E. R. Squibb & Sons," is that on all of the pack-

ages from which these tubes containing narcotics were taken?

49 A. I have not checked that. I don't know whether it is on all of them.

Q. Well, there they are. Look at them.

A. Some of these are sealed.

Mrs. STILES. Go ahead and open them up.

The WITNESS. They all are marked the same.

By Mr. BUCKLEY:

Q. Do you know which of those boxes the tubes were taken from?

The COURT. What is the question?

By Mr. BUCKLEY:

Q. Which of those four boxes were these tubes containing narcotics taken from?

A. There were five in each box except one. There was only four in one box.

Q. Those four boxes were in a large cardboard box which has been broken down or broken up; is that correct?

A. That is correct.

Q. There were also other articles in that large cardboard box marked "Government Exhibit 1?"

A. That is correct. There were a matchbox containing two hypodermic needles, there was a hypodermic syringe, and there was a tube of codeine tablets—tablets marked as codeine.

Q. Where is that tube of codeine?

50 A. That I don't know.

Q. That tube of codeine had an individual stamp on it, did it?

A. I don't remember, Mr. Buckley, if it did or not.

Mrs. STILES. If Your Honor please, may we approach the bench?

(Counsel for both sides approached the bench, and the following occurred:)

Mrs. STILES. I am not sure. This may or may not be proper cross-examination. This is a part of the indictment which the Government has abandoned.

Mr. BUCKLEY. That is the point I am making. I submit that she cannot abandon a part of the count where it alleges two specific parts.

The COURT. We have passed that. That is behind us now. The question is whether it is proper cross-examination.

Mr. BUCKLEY. On direct examination he testified what he found in the box.

Mrs. STILES. I think he did do that.

The COURT. I think so. It seemed all right, too. I think it is within the scope of the direct.

Mr. BUCKLEY. I will tell Your Honor what the purpose of it is. This box is prepared by Squibb & Company, and this box is put up by Squibb & Company. The narcotics in there were the property of the United States Government, the
51 property which was not of Squibb itself. It did not require stamps on there, since the serial number on here is the serial number which they used or were authorized to use from the Treasury Department.

I told Mrs. Stiles some time ago this fellow may have done something, but I doubt if it is something that he was indicted on.

The COURT. We will see about that. I think this is proper cross-examination.

(Counsel for both sides resumed their places at the trial table, and the following occurred:)

Mr. BUCKLEY. May I have this marked for identification? This has not been marked.

(Article referred to was marked "Defendant's Exhibit 1" for Identification.)

Mr. BUCKLEY. Mark this 1-A.

(Article referred to was marked "Defendant's Exhibit 1-A" for Identification.)

By Mr. BUCKLEY:

Q. I show you defense exhibit number 1 for identification and also defense exhibit 1-A for identification. Is this tube marked defense "exhibit 1-A" the tube that you refer to as coming out of this white cardboard box along with these other four smaller boxes [handing articles to the witness]?

A. That is the tube which I have my initials on; yes.

52 Q. Do you know of your own knowledge whether or not that tube was sealed with the tax stamp?

A. It was sealed when we got it.

By the COURT:

Q. With the tax stamp?

A. Yes, sir. It has the tax stamp still on it. It has been broken for chemical analysis.

Mrs. STILES. Speak up, please, Officer.

The WITNESS. It was sealed up when we got it. Part of the seal was on it. It was broken for chemical analysis later on. To my knowledge, it wasn't broken at the time we received it.

By Mr. BUCKLEY:

Q. I want you to examine that to see if there is anything on there that shows it was the property of the United States Government.

A. All it says is, "Poison. 20 hypo tablets codeine sulphate. U. S. P. warning. May be habit forming. Half grain. Caution: For physician's use only. E. R. Squibb & Son, New York." It has a number, 1D44366. The seal is illegible.

Q. In this tube there were a number of individual pills; is that correct?

A. That is correct. There is still part of them in there.

53 Q. And the four boxes in this tube were contents of the large cardboard box?

A. That is correct, with a matchbox and——

Q. Yes, sir.

Mr. BUCKLEY. That is all, sir, at this time.

Redirect examination by Mrs. STILES:

Q. May I ask you this question, Officer? Were these boxes in which these syrettes were contained—the outer box—were there any tax stamps on those?

A. No, ma'am; there were not.

Q. Only a tax stamp on that tube?

A. On this small tube.

Q. Officer, did you take some paper off that?

A. Only the seal.

Q. Will you put those back?

54 By Mrs. STILES:

Q. Officer, you testified that you took this cardboard box containing these things that you have identified to number 11 and turned it over to Agents Bendon and Trygstad and Sergeant Taylor; is that correct?

A. That is correct.

Q. Did the defendant here ever have his hands on this box at any time after it was taken from the waste basket in the men's room?

A. No, ma'am; he did not.

LAWRENCE BENJAMIN FRYE was called as a witness and, being first duly sworn, was examined and testified as follows:

Direct examination by Mrs. STILES:

Q. Will you state your full name for the record, please, Officer?

A. Lawrence Benjamin Frye.

Q. You are attached to number 11 precinct of the Metropolitan Police, are you not?

A. I am.

Q. Were you so attached on the 19th day of April 1944?

55 A. I was.

Q. Directing your attention to that day, did you see the defendant in this case?

A. Yes, I did.

Q. Were you at a filling station near Benning Road on that day?

A. Yes, I was.

Q. Officer, will you tell the ladies and gentlemen of the jury of the circumstances under which you saw the defendant on that day?

A. I was standing in front of Cannoh's service station at Benning Road and Minnesota Avenue about 2:30 in the afternoon, and Officer Harper—I saw him ride down Benning Road and stop a car, and the driver of the car he brought back to the patrol box, which is in front of Cannon's service station.

After making the call to the station, the defendant came into the rest room—came past me to go to the rest room in Cannon's service station, and all this time I was still standing in front.

Finally the defendant came to it. Harper had asked me to watch the defendant, because he had something in his pocket; and after he come out the gas station, to go in and see what I could find. After he came out of the rest room I went in.

Q. What, if anything, did you find in this room, Officer?

56 A. I looked around the rest room to see if there was anything in there, and I finally looked into the trash basket. Under some paper that had been used there was a little white box in the trash basket.

By the COURT:

Q. Did the other officer tell you what to look for? Did he tell you to look for a white box?

A. No, he didn't. He told me that the defendant had something bulging out in his pocket, and he thought that it was some dope, and to look and see if I could find anything in the trash basket.

By Mrs. STILES:

Q. Officer, did anyone go in the rest room with you?

A. I went in first, and after I discovered the box I came out and got the attendant who was at the station, and took him in and asked him if he had seen that box there before.

Q. Officer, I show you Government Exhibit No. 1 for Identification, which appears to be a box from which paper covers have been taken. Will you tell me whether you have ever seen that before [handing an object to the witness]?

A. I have seen this. These are my initials up here [indicating].

Q. Which are your initials?

A. L. B. F. I put my initials on all of these.

Q. When did you put your initials on those, Officer?

57 A. After I came out of the rest room with the box and in the presence of Officer Harper and myself; after we looked into the box I initialed it.

Q. You say "we looked into the box?"

A. Yes, sir.

Q. Did you see what was in the box?

A. I did.

Q. What was in the box, Officer?

A. There were some small boxes. There was a matchbox with two hypodermic needles, and there were some little bottles containing some sort of liquid, I think.

Q. Was there anything else in there, Officer?

A. Yes. There were four boxes—four small boxes inside the larger box, and there was some codeine—the label on the bottle said there was some form of codeine in some of them, and I don't remember the others.

* * * * *

59 Q. Officer, when you brought these things out of the men's room did you state what you did with them? You may have. I may have overlooked that. When you brought this box out of the men's room what did you do with them?

A. I kept the box until Officer Harper had sent the defendant into the precinct, and with him we looked into the box.

Q. And then did you turn it over to Officer Harper?

60 A. I did.

Q. Officer, did you at any time ever hand that box to the defendant Frazier?

A. No.

Mrs. STILES. You may question, Mr. Buckley.

* * * * *

85 RAYMOND HOLT was called as a witness and, being first duly sworn, was examined and testified as follows:

Direct examination by Mrs. STILES:

Q. Will you state your full name, please, Mr. Holt?

86 A. Raymond Holt.

Q. Speak up loudly so all these ladies and gentlemen over here can hear you. I do not think you need to speak into that. I do not think it is working. Turn your head this way and they can hear better. Where do you live?

A. 815 L.

Q. Directing your attention to April 19, 1944, were you working for Mr. Charles W. Cannon?

A. Yes; I was.

Q. On April 19, 1944, the afternoon of that date, were you at work that day?

A. Yes; I was.

Q. Take your hand down. I am afraid that will quiet your voice. Did you see the defendant, Robert Frazier, that day?

A. I did.

Q. When did you first see him?

A. When I first seen him Officer Harper stopped his car.

* * * * *

By Mrs. STILES:

Q. Where were you at that time?

87 A. Standing at the station door.

Q. Go ahead. What happened after that?

A. When he got to the box Mr. Frazier came over to the station and came into the wash room, and Officer Frye was standing at the door, and he said to him, "Follow him."

Q. Said to him what?

A. "Follow him."

Q. Who said to him?

A. Officer Frye?

Q. Who said that to Officer Frye? Who said, "Follow him"?

A. Officer Harper, he was calling him, Officer Frye, to follow him.

Q. What did the defendant do then?

A. He went into the washroom.

Q. Did you notice anything unusual about him as he went past you?

A. Yes. He had on a topcoat, and it seemed to me his pocket—was something in his pocket.

Mr. BUCKLEY. Keep your voice up.

The WITNESS. He seemed to have something in his topcoat pocket. It was full of something. I don't know what it was.

By Mrs. STILES:

Q. Did you see him go into the men's room?

A. I did.

88 Q. Did you see anyone come out of the men's room as he went in?

A. I did.

Q. Did the man who came out of the men's room come out before he went in?

A. Yes. He was going in and this man was coming out.

By Mr. BUCKLEY:

Q. What was that?

A. He went in and this man was coming out—the insurance man.

By Mrs. STILES:

Q. Did you see the defendant after he came out of the men's room?

A. I did.

Q. Did you notice his appearance at that time?

A. I did.

Q. Was it any different from what it was when he went in?

A. It was.

Q. Speak up.

A. It was. His pocket didn't seem to be bulging as it was. His pocket didn't seem to have anything in it.

Q. Now, then, did there come a time when you went in the men's room?

A. When Officer Frye went in, I went in.

89 Q. When was that?

A. Just as the defendant came out.

Q. Were you with Officer Frye at the time he was in there?

A. I was.

Q. What, if anything, did you find in that men's room?

A. Officer Frye looked in the trash can and went through the papers and picked up the box and package and walked back out to Officer Harper.

Q. What kind of box? Can you describe it?

A. No. It was a box about so tall [indicating].

Q. What color?

A. I can't recall that now.

Q. You can't recall the color?

A. I can't recall the color of the box.

Q. Did you see the contents of the box?

A. I did not.

* * * * *

125 VERNON O. TRYGSTAD was called as a witness and, being first duly sworn, was examined and testified as follows:

Direct examination by Mrs. STILES:

Q. Will you state your full name, please, Mr. Trygstad?

A. Vernon O. Trygstad.

Q. You are an agent of the Narcotic Bureau, are you not, Mr. Trygstad?

A. Yes, I am.

Q. And were on April 19, 1944?

A. Yes, I was.

126 Q. Directing your attention to that date of April 19, 1944, did you go to number 11 precinct of the Metropolitan Police Department?

A. Yes, I did.

* * * * *

128 Q. Now Mr. Trygstad, at number 11 precinct, where you received these exhibits you have identified, was the defendant present at that time?

A. Yes, he was.

Q. Did he at any time have any of these exhibits you have identified in his hands at the precinct?

A. No; he did not.

Q. Did you have any conversation with him at that time?

A. Yes, I did.

Q. Would you tell us what that conversation was, please?

A. In general?

129 Q. No, not generally. I mean in connection with these exhibits that you have identified here.

A. Yes.

Q. Did you ask him any questions about them?

A. I asked him if it belonged to him, and he denied that it belonged to him.

* * * * *

134 Cross-examination by Mr. BUCKLEY:

Q. Mr. Trygstad, with whom did you go to number 11 station?

A. Agent Bendon.

Q. When you arrived at number 11 where was the defendant, if you saw him?

135 A. He was in a room on the first floor of number 11 precinct, a room which faces Nichols Avenue.

• • • • •

140 Q. When you said "original containers," you referred to these four boxes, on which the name, "E. R. Squibb Company, New York," is?

A. That is right.

Q. On each of those boxes does the same number appear? Look at them, first. Then read to the reporter, if you will, what number appears on each box [handing articles to the witness].

A. "Control 3-D-41007."

Q. That appears on all four boxes?

A. Well, this one is blurred, but you can see it appears to be the same.

Q. "Control 3-D-41007"?

A. That is right.

Q. It was from these boxes that you took the syrettes?

A. That is correct.

• • • • •

154 Dr. ALBERT A. SPEAR was called as a witness and, being first duly sworn, was examined and testified as follows:

Direct examination by Mrs. STILES:

Q. Will you state your full name, please, Doctor.

A. Albert A. Spear.

Q. You are with the United States Chemists Office?

A. Bureau of Internal Revenue.

Q. Bureau of Internal Revenue?

A. Yes.

Q. Doctor, I show you Government Exhibits 1-D,

155 which is an envelope containing certain syrettes, Government Exhibit No. 2 and 2-A, each of them being

envelopes, and ask you if you have seen those before [handing articles to the witness].

A. Yes, ma'am.

Q. Where did you see those, Doctor, first?

A. In the laboratory.

Q. By whom were they turned over to you?

A. Agent Bendon.

Q. Did you make an analysis of the contents of those syrettes?

A. Yes, ma'am.

Q. What did you find them to be, Doctor?

A. There were 19 syrettes containing morphine tartrate solution of half a grain each.

Q. Is morphine tartrate a derivative of opium?

A. That is right.

Mrs. STILES. You may question.

Cross-examination by Mr. BUCKLEY:

Q. Dr. Spear, you made the analysis of these syrettes?

A. Yes, sir.

Q. In Government Exhibit 1-D, and did you also make the analysis of defense exhibit 1-A [handing an article to the the witness]?

A. Yes, sir.

156 Q. At the time that you made an analysis of the contents of this tube, defense exhibit 1-A, what condition was the tax stamp in on there?

A. It was intact. I broke it.

Q. You broke it?

A. Yes.

Q. Do you recall on what date you made the analysis as to the contents of exhibit 1-A? That is the tube.

A. Let me see the envelope there [indicating].

Q. That envelope he has called for is defense exhibit 2-B?

A. May 3, 1944.

Q. May 3. In the ordinary course of your profession and employment, after making an examination or analysis of the contents of exhibits submitted to you for analysis, you make a report of your findings, do you not?

A. Yes, sir.

Q. To whom do you submit those reports or to whom do you give them?

A. Oh, I think they all go to the Narcotics Bureau. The Narcotic Bureau gets them.

Q. The Narcotic Bureau gets them?

A. Yes, sir.

Q. How soon after May 3 in the ordinary course of business, would they receive them?

157 A. That depends on how busy we are and how long it takes to have them written up by the typist.

Q. Would the Narcotic Bureau have received your report by June 5, in the ordinary course of business, if you made the examination May 3?

A. Well, I could not say unless I saw a copy of the report, as to what date it was. It has been two years.

Q. Do you have a copy of the report with you?

A. No, I have not.

Mrs. STILES. I have a copy [handing a document to Mr. Buckley].

By Mr. BUCKLEY:

Q. I show you this. Is that a copy of your report [handing a document to the witness]?

A. That is right.

Q. From that report, or copy of your report, are you able to ascertain when that report was written up?

A. Well, they received it May 15.

Q. The Narcotic——

A. The Narcotic Bureau stamp on there is May 15.

Q. They received it May 15?

A. Yes.

Q. Did you appear before the grand jury in this case if you recall?

A. No, sir.

158 Mr. BUCKLEY. That is all.

Mrs. STILES. That is all, Doctor.

By Mr. BUCKLEY:

Q. Doctor, did you at any time ever have these four small boxes, marked Government Exhibit 1-A, in your possession? Look at them [handing articles to the witness].

A. No, sir.

Q. You did not?

A. No, sir.

Q. When you received these syrettes they were in this envelope [indicating]?

A. That is right, in that envelope there, and I placed them in this envelope here [indicating].

Q. They were in the envelope marked "Government Exhibit 1-D"?

A. Well, they were not at that time.

Q. I mean, they were in this envelope which now is marked "Government Exhibit 1-D"?

A. Yes.

* * * * *

162 ALBERT B. GROUND was called as a witness and, being first duly sworn, was examined and testified as follows:

Direct examination by Mrs. STILES:

Q. Will you state your full name, please?

163 A. Albert B. Ground.

Q. What is your official title, Mr. Ground?

A. Specialist in fingerprint identification.

Q. Of the Federal Bureau of Investigation?

A. Federal Bureau of Investigation.

* * * * *

Q. Mr. Ground, was there turned over to you by Mr. Trygstad of the Narcotics Bureau certain boxes to make an examination of latent fingerprints?

A. Yes, ma'am.

* * * * *

164 Q. I show you Government Exhibit 1-A, Mr. Ground, which are four boxes that have been taken apart numerous times, and ask you if you have seen those before [handing articles to the witness].

A. I have.

Q. Where did you first see those?

A. At the same time, in the laboratory of the Federal Bureau of Investigation in Washington.

Q. I show you Government Exhibit 1-B for Identification and ask you if you have seen that before [handing an article to the witness].

A. I received that at the same time as the other specimen.

Q. Were there any other specimens that I have not shown you that were turned over to you, Mr. Ground?

A. There were some small articles in the box. I believe they were in the matchbox.

165 Q. They are still there, Mr. Ground [handing articles to the witness].

A. That is correct; two needles.

Q. Now, Mr. Ground, did you examine these articles for latent finger prints?

A. I did.

Q. Did you find on any of them a finger print——

A. I did. I developed five finger prints.

By the COURT:

Q. What is that?

A. I developed five finger prints on one of these boxes.

* * * * * *

166 By Mrs. STILES:

Q. Can you answer this question? It may not be proper. Were those five finger prints of the same person?

A. No, ma'am.

Q. Did you examine those finger prints in connection with any known finger prints of any person?

A. I was requested by Mr. Trygstad to compare any latent impressions which may be developed on any of the specimens with the finger prints of one Robert Frazier.

Q. I show you Government Exhibit No. 3 for Identification and ask you if you have seen that finger print card before [handing a document to the witness].

A. I have.

Q. Are those the known finger prints that you used in your examination, Mr. Ground?

A. They are.

Q. Did you find that any finger print on that box was the finger print contained on this?

A. Two of the latent impressions developed on the batch I identified with the left thumb print appearing on this finger print card.

* * * * * *

184 PROCEEDINGS

The COURT. Members of the jury, I will be occupied at the outset this morning with some legal questions in the case now on trial. I think I can safely excuse you for a half hour. You can walk around the block in the sunshine, rather than sit here listening to what I think will be the usual dry legal argument. So I will excuse you until 10:45.

(The jury left the court room.)

* * * * * *

(Some other matters were heard, after which, with the jury still out of the courtroom, the following occurred:)

The COURT. Do you have any more evidence?

Mrs. STILES. No. Mr. Buckley will stipulate that the finger print card identified by the Marshal is the finger print card of this defendant, Robert Frazier, and I want to enter my exhibits. That is all.

The COURT. You want to argue your motion, do you?

Mr. BUCKLEY. Yes, sir.

The COURT. Very well. Proceed. I will take up the question first of the so-called amendment which you say the District Attorney cannot make to the indictment.

185 Mr. BUCKLEY. With respect to that point, sir, I want to say that this indictment, as Your Honor knows, is in one count, and in one count it alleges that the defendant purchased morphine and codeine tablets, which drugs were not then and there in the original stamped package.

Mrs. Stiles in her opening statement informed the Court and the jury that she was going to abandon the portion which referred to the 20 one-half grains of codeine sulphate tablets because there was not sufficient evidence to proceed with that part of the indictment.

I submit, if the Court please, that where she informs the jury of that and says there is not sufficient evidence and that she is going to abandon that portion of that count, she as the prosecutor is attempting to amend the indictment as it was returned by the grand jury, because after your Honor charges the jury and Your Honor goes out, that jury has to come back and return a verdict of either guilty or not guilty or that they cannot agree.

When the jury is asked by the Clerk if they are agreed upon a verdict as to the only count there is in the indictment, they will have to say either guilty or not guilty. They cannot say guilty as to a portion of it and not guilty as to another. That verdict would not be a valid verdict.

Since these are two separate and distinct narcotics, I submit they should have been put in two separate counts.

186 From the evidence on the stand by the chemist, his analysis was made and his report was made some time around the 4th of May, and he says that a few days later that report would have been in the hands of the narcotic agents. The indictment was not returned, I do not think, until about the middle of June.

Now, those agents knew that a portion of these narcotics had on them a tax paid stamp for codeine. They knew that because they would not present the matter to the grand jury until there was an analysis made. Regardless of that, they still go before the grand jury and insert in the same count something that they know should not have been put in there.

The COURT. The agents do not do that. The District Attorney draws the indictment.

Mr. BUCKLEY. I understand that, but they should have advised the District Attorney's office that these codeine tablets should not be included in this indictment, because of the fact that they had a tax paid stamp on them. Instead of that, that was not done, and instead of putting it in two separate counts, because they are different articles, they put them into the one count.

Mrs. Stiles comes around now and attempts to correct that which should have been corrected by the District Attorney in the grand jury, and it is my position that she cannot change

this, because when that jury comes back they have to
187 say guilty or not guilty. The record will show, if he is guilty of the one count in the indictment, that he possessed these articles. That is what the record itself will show. This being a revenue statute, he is therefore liable for a tax on that record, and you cannot go behind this record——

The COURT. That record plus this one which the reporter makes tells the story.

Mr. BUCKLEY. No, sir. It is that record, that he is found guilty. That verdict cannot be split up.

The COURT. I am familiar with the *Bain* case. Do you have any other? You mentioned the other day a *West Virginia* case, which I have not been able to find.

Mr. BUCKLEY. I beg your pardon?

The COURT. I thought the other day you mentioned a *West Virginia* case. I have been unable to find it.

Mr. BUCKLEY. It is *United States* v. *Clayton*, Circuit Court of Appeals, Fourth Circuit, found in 284 Federal Reporter at 537.

The COURT. What are the facts, Mr. Buckley?

Mr. BUCKLEY. I gather from this, Your Honor, that it is a perjury case, there were several answers to questions in a driving while drunk case which the defendant Clayton answered under oath.

In that case he was indicted for perjury, and the perjury was based on the fact that his answers were not the
188 proper, true answers to the questions propounded to him and that he knew he was committing perjury. However, in the indictment there was one count setting forth several different perjuries that he had committed, his answers being different ones, at the same testimony, same trial, and all, and because the jury found him guilty of certain perjuries and not guilty of other perjuries, which were in the one count indictment against him, the Court says:

"An indictment for perjury may embrace in a single count all the particulars in which defendant is alleged to have sworn falsely; but each fact sworn to should be stated in distinct and separate assignments, and each traversed, so that if either assignment is proved the indictment will be sustained."

If these two different classes of narcotics were put in separate counts and she wanted to abandon one, the others would have sustained the indictment. But here, where she is attempting to abandon one, I submit that will not sustain the indictment.

The COURT. If the indictment had charged—a larceny indictment—that the defendant a $100 bill, a wrist watch, and a radio, and the Government finds at trial time that it cannot prove he stole the radio, do you contend the indictment falls?

Mr. BUCKLEY. No, sir; not there, because it is a
189 question of amount. The $100 bill alone would be sufficient to convict that defendant of grand larceny.

The COURT. The morphine here convicts him, if at all, of this offense, does it not? What is the difference between the hypothetical case I have——

Mr. BUCKLEY. One is the amount, sir. In the hypothetical case you just mentioned, if they alleged $10,000——

The COURT. I am not talking about an indictment in one count. The charge is larceny of three items——

Mr. BUCKLEY. All the Government ever has to prove in a larceny case is that the value of whatever is stolen amounts to $50 or more.

The COURT. What is the difference between that and this? All the Government has to do here—is this not so—is to prove that he got certain narcotic drugs. Now, they name two, morphine and codeine. They cannot prove the codeine. They can prove the morphine. He has committed an offense if that is so, it seems to me. I do not see any difference.

Mr. BUCKLEY. In the larceny case the indictment would be for grand larceny. If two of those articles could not be proven and the remaining article is a $100 bill, he is guilty of grand larceny. On the record it will show he is guilty of grand larceny. There is no tax to be placed against him. He is guilty of grand larceny, because he stole something of the value of $50 or more. But here when the jury comes
190 back and says guilty, that verdict cannot be qualified in any way.

The COURT. You would have an absolute, complete defense of any claim against him by the Internal Revenue Bureau for the codeine, because this record is made, and the record

shows that the Government abandoned that and admits it cannot prove that, so there is no basis for a claim against him for that.

I get your point. I have read the cases on it. I did not think, personally, there was anything to it. Then I thought about it a little bit and thought perhaps you did have something. I have cases here which have convinced me completely that there is nothing to that point. Do you have any other point you want to raise?

Mr. BUCKLEY. Yes, sir. If Your Honor pleases, the one count indictment is based on Section 2553 (a) of the Internal Revenue Act.——

The COURT. What is the title and the section?

Mr. BUCKLEY. 2553 (a), Title 26.

The COURT. Is that the only statutory reference you are going to cite?

Mr. BUCKLEY. No, sir; and 3220—which 2553 refers to—and 3221. 2553 (a) reads as follows:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in Section 2550 (a) except in the original stamped package or
191 from the original stamped package; and the absence of appropriate tax paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by Sections 3221 and 3220 shall be prima facie evidence of liability to such special tax."

If the Court please, it is my position, with respect to these packages——

The COURT. (to the Deputy Marshal). See that the jury does not come in.

Mr. BUCKLEY. Mrs. Stiles says she is going to abandon the part about codeine. I submit, sir, with respect to these other boxes, that the contents of these boxes were prepared by E. R. Squibb & Sons.

The uniform narcotic law says that any manufacturer, producer, compounder, and so forth, when he manufactures or

produces, must do certain things, must put his name on the box, who the manufacturer is, the contents thereof, and a registered number.

I submit in these cases these are just as much the original stamped package as a tube of codeine sulphate is. We have on here, "Control, 4–D–31007," and that is the serial number under which Squibb & Company put these things out,
192 and this is the original stamped package.

The COURT. To be sold by Squibb & Company.

Mr. BUCKLEY. Yes; manufactured for the Medical Department of the United States Army.

Just yesterday evening it was brought to my attention by someone that there was an article appearing in the paper on Friday, which was headed up by Mr. Anslinger, who is Commissioner of Narcotics, about syrettes which had been prepared for the Army, and that the surplus property people had been selling these life rafts. Did Your Honor read the article?

The COURT. Yes.

Mr. BUCKLEY. These syrettes were taken out by one of the agents, out of these boxes. All the requirements that maintained that this is an original stamped package are laid down in the Uniform Narcotic Act, and all the requirements are conformed with by the Squibb & Company. They have the control number, by whom they are made, and what the contents. Therefore, I submit that the possession of these syrettes by someone does not mean that they are not in or from the original stamped package. They are found in the original stamped package, and they are taken from that original stamped package, and put into an envelope and sent to a chemist.

These individual syrettes do not come that with, with tax stamps, like the codeine bottle does. They are manufactured this way [indicating], with the registered number,
193 which gives them permission to manufacture these things from the Treasury Department right here, on each of the packages. I submit that they are the original stamped packages.

This defendant could not be guilty under this section. It says that if someone has possession of a narcotic, "the posses-

sion of any original stamped packages containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by Sections 3221 and 3220 shall be prima facie evidence of liability to such special tax."

If he has possession of these stamped packages, and if that creates prima facie evidence of liability for the taxes by a person who has not registered and paid the special tax, as required by Sections 3220 and 3221, if he comes in that class of person who should have registered and paid the tax, that must be set forth in the indictment—that he, being a person who should have registered and paid the tax, failed to do so, and then go and state that these things are in his possession.

But he is not within that class of person, because that class of person are only importers, producers, compounders, manufacturers, and sellers.

Had they indicted this man under 3224 (e) for possession, the indictment may have stood. But he is indicted under 2553 (a).

There is no way—and I say this in all sincerity—
194 that this man could be convicted of this offense. Both packages are stamped packages. Both of them meet the requirements of the law.

If they say, "All right, that presumption does not exist because they are in the stamped package," how about the second portion of 2553 (a), which says:

"And the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxe as required by Sections 3221 and 3220 shall be prima facie evidence of liability to such special tax?"

As to the second portion, and the statutes state it clearly, if he comes within a class of person who are supposed to register and does not, the indictment must set forth that he came within that specified class, and this does not say anything about his being in that class of persons.

I move, Your Honor, for a judgment of acquittal on the ground that there is no violation of law as far as this defendant is concerned, and there is no presumption placed on him when they are on stamped packages.

The COURT. What do you say, Mrs. Stiles?

Mrs. STILES. As I understand Mr. Buckley's contention, it is that because these syrettes were made only for the Government's use, and therefore required no tax stamp, being made for the Government's use, this man had a right to have
195 them; that he has not violated this statute, which says it shall be unlawful for any person to have nontax paid narcotics in his possession.

Your Honor, I contend that this statute governs such a case as that. This man had no right to possession of these things. They were not stamped. Therefore, they come within this statute. Just because they did not have to be stamped because they were made only for the Government, and the Government's use only, is no shield that he can crawl out from the possession of it, which we have shown he had.

As far as the codeine is concerned, we have abandoned that.

The COURT. This has been puzzling me all through the case. The indictment charges that he did not at that time purchase, sell, dispense, and distribute. Your proof shows he possessed.

Mrs. STILES. Yes, Your Honor, and the first part of that statute says:

"And the absence of appropriate tax paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found."

In other words, it is up to him to explain what he was doing with these narcotics.

Mr. BUCKLEY. May I read from American Jurisprudence, on page 854, Volume 17?
196

"Prosecutions for violations of regulations. Possession of a drug is not and cannot lawfully be made prima facie evidence of a violation of the Harrison Narcotic Act, but making the possession of a narcotic drug which does not bear the required stamp prima facie evidence of its purchase other than that from the original stamped package."

There is no presumption in this case of that. Presumption belongs only to people who have heroine, or morphine tablets, or something in the original control numbers on the box. The

agent himself put, "Removed from original container" on there. That is what the agent wrote.

The COURT. Is that Section 834 or page 834?

Mr. BUCKLEY. It is page 854, Volume 17, American Jurisprudence.

The presumption attaches only when narcotics are found that are not in a stamped packaged or not from the original stamped package.

The COURT. That is what I want to ask you about. This box seems to comply with the law. Your indictment charges that these drugs were not then and there in or from the original stamped package. Is this not an original stamped package?

Mrs. STILES. It is the original package, but it is not a tax stamped package, which is what the law contemplates,
197 because they were not made for public use. They were made for the use of the Government only. Therefore, no tax stamps were put on them.

I know what confuses Your Honor, and it confuses me, too, but I have satisfied myself that this is an unusual example of narcotics that we found in the possession of the defendant.

Mr. BUCKLEY. This is the original stamped package.

Mrs. STILES. The original package, but it is not the original stamped package. There is no stamp on it. There never had to be a stamp on it, because it was made for the use of the Government, because it was made for the use of the boys, to put in the first aid kits, to save their lives when they were wounded.

It is our contention that, although it is a tax law primarily, it is designed to stop the circulation of narcotics. This comes within this statute, because this man had in his possession these narcotics, and he gives us a prima facie case. In other words, he has them, they are not tax stamps, and the fact that they did not have to have tax stamps on them makes no difference. That is our position.

The COURT. Have you got a case that fits this one factually?

Mrs. STILES. No, sir. There has never been one, so
198 far as I know, that has been exactly like this, where something has been purely for the Government, as these were. It is my understanding—I think Mr. Buckley will correct me if I am wrong——

The COURT. Suppose he had been in the Army and had gotten one of these as a soldier. I do not know how they passed them out, but presuming for the moment that he did have it, he would not be guilty of an offense if he got one. Is it your position that being in possession of them puts the burden on him to explain how he got them?

Mrs. STILES. Definitely, that is our position, Your Honor. I do not care who he was——

Mr. BUCKLEY. Your Honor, when they are in or from the original stamped package, there is no burden on this man to show anything. She alleges in the indictment that he purchased them. The law presumes that he purchased them. If they are not in or from the original stamped package, that is the presumption. Here they are in the original stamped package, taken out by agents who send them to the chemist, and he so states in this paper.

The COURT. This is the part that puzzles me, and it puzzles me quite a lot. They may be in the original package; they are not in the original stamped package.

Mr. BUCKLEY. If Your Honor please, in or from the original stamped package. Certainly, when Squibb puts those
199 narcotics—Squibb is not bootlegging. They had to come from Squibb's original stamped package.

The COURT. As I gather, Squibb did not have to put any stamps on them at all because they were conveying them to the United States Government.

Mr. BUCKLEY. That is correct, but when Squibb manufactured, when Squibb took those and manufactured them into syrettes, Squibb is not dealing with bootleg narcotics——

Mrs. STILES. Your Honor, it is my recollection——.

Mr. BUCKLEY. You can rest assured that when Squibb puts anything out, he is going to comply with the law.

She is alleging purchase now. I told Mrs. Stiles a long time ago, "This indictment, in my opinion, will never stand up. The man was indicted wrong. The man should have been indicted for possession of Government property, or something, but not this."

Mrs. STILES. If Your Honor please, as I understand the last contention of Mr. Buckley, it was that when Squibb made

these syrettes for the Government's use, it made them from narcotics that had a tax stamp on them—that is, from the drug.

It says on this box, "Produced by E. R. Squibb & Sons for U. S. Army Medical Department. Morphine used was property of United States Government."

If I interpret that statement correctly, they were
200 using morphine belonging to the United States at the time they made those syrettes.

Mr. BUCKLEY. It does not matter to whom the morphine belongs. The question is, Is this container classified as an original package?

Mrs. STILES. But not original stamped package.

Mr. BUCKLEY. There is no stamp on this. If you go to a pharmacist and have a prescription filled for morphine sulphate tablets, you get a label on it. There is no stamp on it. Mrs. Stiles has never seen the stamp on it, because it is the original stamped package. It is considered that, because the druggist who fills that prescription has a register number, the same as this control box, and his number is on that box.

Your Honor has never seen a prescription filled by a druggist with a stamp on it. If Your Honor gives that prescription bottle to me, and it is found on me, and it has that serial number, I cannot be prosecuted for it.

Mrs. Stiles knows the situation: "Removed from original container, original box, 4–20–44."

The COURT. "The original" used in that sense means the box they got from him. That is all that means.

I do not know the answer right now. I am going to overrule your motion, and I am going to ask each of you, in the event of conviction, to brief it for me on a motion for
201 a new trial. I just do not know the answer now. Therefore, I am not going to guess against the Government, but whatever I do today is a guess.

Mr. BUCKLEY. I will be very glad to brief it.

The COURT. I will deny the motion and let you put in your proof. As I say, you can argue it on a motion for a new trial. Are you going to put on any evidence?

Mr. BUCKLEY. No, sir. My contention is that there is no presumption here.

The COURT. Because I am puzzled about this, it follows that I am puzzled on how to charge this jury. Are you prepared to submit a request for instructions on the law of this case, or do you want some time to get it together?

Mrs. STILES. Your Honor, I have not any together. Of course, it was my belief that Your Honor would be justified in charging them on this second part of the statute, which says that if we have shown that there are no appropriate tax paid stamps on these morphine syrettes, we have shown a prima facie case against the defendant, which he must explain. That is, he must explain his having these narcotics. Otherwise he is guilty of a violation of this statute.

Mr. BUCKLEY. Is it Mrs. Stiles' contention that if a man has a prescription filled by Maxwell & Tennyson of morphine sulphate tablets in his pocket and, because there are no
202 stamps on it, even though they have a register number or control number, that because there are no stamps on it he is liable to be prosecuted? That is her contention—because there are no stamps. Certainly that is not sound.

The COURT. I will give you some time, Mrs. Stiles, to prepare an instruction for me on the law. I do not know how to charge this jury this morning, and I certainly ought to know before you argue the case, because I do not want you to argue one thing and have me charge another thing.

Mr. BUCKLEY. Will Your Honor give us time to prepare prayers?

The COURT. Suppose I recess until 1:30. Will an hour do? Is that enough for you?

Mrs. STILES. I think so, Your Honor. I will do my best in that time.

The COURT. How about it, Mr. Buckley?

Mrs. STILES. Now that Your Honor has placed the burden on me of having the charge, I think I would like to have enough time.

Mr. BUCKLEY. Is it possible to continue the matter over until tomorrow morning to submit these prayers?

The COURT. Perhaps we could. I could get another case this afternoon. I won't be here tomorrow morning. I won't convene tomorrow until 1:30. We have a General Term today

at 12:30 that will last until 2. Surely you could
203 give me whatever you have by the end of today, so that I can charge the jury at 1:30 tomorrow. I will do that. I think it is a serious question; I really do. It may be simple, but it does not seem so to me.

Mrs. STILES. I will admit it is a new question, Your Honor.

The COURT. It may be that it is new and simple, but for the moment I do not think it is new or simple. I will give you the rest of the day. Have for me by 3 o'clock this afternoon the instructions you think I should give. That will give me time, tonight to work on it. I will do whatever I can in the meanwhile. We will reconvene in this case at 1:30 tomorrow afternoon.

Mr. BUCKLEY. This is one section of the law which the Government has to allege—that is, knowledge.

The COURT. You mean the statute requires knowledge?

Mr. BUCKLEY. Yes, sir; the statute does.

The COURT. Which one?

Mr. BUCKLEY. 2553 (a). I can show you cases. Knowledge must be alleged.

The COURT. You mean there is no presumption to take care of it?

Mr. BUCKLEY. No, sir.

The COURT. You say it must be alleged?

Mr. BUCKLEY. Yes, sir.

204 The COURT. It is alleged.

Mr. BUCKLEY. It must be alleged that, knowingly, he did it.

The COURT. You mean that it has got to be proved? There is no presumption to take care of it?

Mr. BUCKLEY. No, sir; there is no presumption. It takes care of it as far as selling is concerned. Anyone who handles it or sells it does so at his own peril, but here there is the possession only, and the law is that since so many people have to order stuff from manufacturers and they resell it, if it is not properly stamped they are not liable unless you can prove knowledge on their part.

The COURT. Draw up your instructions as you wish me to charge them, and cite the law.

Mrs. STILES. May I have a copy of them?

The COURT. Yes; you each exchange them.

(The jury entered the courtroom, and the following occurred:)

The COURT. Members of the jury, in the case now on trial, there is a legal question in connection with the case which I have not been able to resolve in my mind, and I must therefore excuse you until tomorrow.

Now, so far as you are concerned, I will ask you to report here at 1:30 tomorrow—not tomorrw morning, but at 1:30. Take your seats in the box at that time.

* * * * * *

213 ROBERT FRAZIER, the defendant, was called as a witness and, being first duly sworn, was examined and testified as follows:

Direct examination By Mr. BUCKLEY:

Q. What is your full name?

A. Robert Frazier.

Q. Now, keep your voice up so the last lady on the
214 end can hear you. Robert Frazier?

A. Yes.

Q. Where do you live?

A. 4922 Central Avenue Northeast.

Q. Were you living there on the 19th of April 1944?

A. I was.

Q. Directing your attention to the afternoon, approximately 2 o'clock of that day, did there come a time when you were arrested by a motorcycle officer for speeding on Benning Road?

A. I was.

Q. Were you taken to a patrol box by the officer?

A. I was.

Q. Did there come a time at this patrol box that the officer permitted you to leave him and go to a rest room?

A. He did.

Q. At the time you left the officer did you have in your possession a certain cardboard box?

A. I did.

Q. When you left the rest room and went outside again did you still have the cardboard box with you?

A. No; I did not.

Q. Tell the Court and the ladies and gentlemen of the jury what you did with the cardboard box.

A. Well, I got rid of the cardboard box——

215 Q. What did you do with it? Where did you deposit it?

The COURT. Keep your voice up, please, so I can hear you, too.

By Mr. BUCKLEY:

Q. Speak loudly.

A. I say, I did away with the box.

By the COURT:

Q. The question is; what did you do with it?

A. I put it in the trash can in the service station.

By Mr. BUCKLEY:

Q. Will you tell the Court and the ladies and gentlemen of the jury what your purpose was in placing it in the trash can or disposing of it? Why did you get rid of it?

A. Well, the reason why I got rid of it was for the simple reason I didn't know what it was. I come here from Baltimore——

Mrs. STILES. Pardon me. I did not get that.

The COURT. He said the reason he got rid of it was for the simple reason that he did not know what it was.

Mrs. STILES. Thank you.

By Mr. BUCKLEY:

Q. I will withdraw my question I put to you, and ask you, where did you get this box?

A. I was given it to take it in. I was coming from Baltimore and I picked up two soldiers at Laurel. They said

216 they wanted to go to Washington.

Q. Did you know either one of those two soldiers?

A. No. They were hitchhiking.

Q. Do you know where the soldiers were stationed or did they tell you where they were stationed; what camp they were in?

A. I think they were stationed at Camp Meade.

Q. This is at Laurel, Maryland?

A. That's right.

Q. Were you driving at the time or had you stopped anywhere in Laurel, Maryland?

A. No; I was driving. I was waiting for the light when I picked them up.

Q. After you picked them up and they were in your car what, if anything, happened?

A. Well, we rode along about two miles, I guess, a mile and a half, before we started the conversation.

Q. Did there come a time when you got possession of this box?

A. Yes.

Q. Where did you get possession of this box from these men?

A. I say, about a mile and a half after I picked them up, just as I was coming out of Laurel.

Q. In Maryland?

217 A. That's right.

Q. After you got possession of the box there, did there come a time when you looked at any of these articles?

A. No, I did not.

Q. I do not mean the contents of the box. Did there come a time when you looked at the box?

A. No; I only looked at the box that he give me.

Q. How is that?

A. I only looked at the box he gave me in the car.

Q. You looked at the box he gave you in the car?

A. I didn't look inside the box to see what was in it.

By the COURT:

Q. I do not understand. You did or you did not look in the box?

A. I didn't look in the box.

Q. You did not look in the box?

A. I only looked at the writing on the outside.

By Mr. BUCKLEY:

Q. You say the writing on the outside. I show you this box. You mean that writing [indicating]?

A. That's right, the writing on the outside of the box.

The COURT. What box are you handing him?

Mr. BUCKLEY. I am handing him one of the four boxes of the Government Exhibit——

The COURT. 1-A?

218 Mr. BUCKLEY. 1-A.

Mrs. STILES. May I ask what was the question? If he read what was on the box?

Mr. BUCKLEY. If he did.

Mrs. STILES. All right.

By Mr. BUCKLEY:

Q. From what you did read on one of these boxes——

Mrs. STILES. I beg your pardon. I understood him to say he did not read what was on the box. Maybe I misunderstood.

The COURT. Try it all over again. I am sure I do not know.

By Mr. BUCKLEY:

Q. After you got possession of this large box which contained these little boxes, you said it was about a mile and a half out of Laurel?

A. Yes.

Q. Did you then look at one of these boxes?

A. I did.

Q. Did you read what was on the box?

A. No. He opened it aid showed it to me himself, and I read what was on the box.

Q. Did you read "Squibb & Company" on this box?

A. Yes, I did.

Q. Did you at that time think there was anything

219 illegal about these?

A. Not after I read it. I didn't think there was anything illegal about it.

Q. Do you as of today think there is anything illegal about it? Are you still of the same belief it is not illegal?

A. I don't have the same belief now as I had then.

Mrs. STILES. I object to what he believes.

By Mr. BUCKLEY:

Q. Why did you dispose of these articles in the men's room?

A. When the cop picked me up I didn't have them in my pocket. I still had them in the car from the time the fellow gave them to me. When the cop picked me up I knew it was

United States property and I didn't want to have it on me. I wanted to get rid of it, because I knew I wasn't supposed to have it.

Q. You read enough to know it was property of the United States?

A. That's right.

Q. Now, when the officers confronted you later with this package, where did they first show you the package? Where were you when you were shown this package after you left it in the rest room?

A. I was shown it in number 11 precinct.

220 Q. In number 11 precinct?

A. That's right.

Q. Did they put you in a cell in number 11 while you were there?

A. They did; yes, sir.

Q. How soon after you were brought in did they put you in a cell?

A. I was put in a cell after the officer he come in and he opened the box—this is after I been searched. After he got through searching me he said, "Come into the little room. I want to speak to you."

He pulled out one of the boxes.

He says, "What's this?"

I take one of the boxes. I looked at it. I still don't know what it is. I say I don't know what it is.

So he put it back in the box, put it on the table, called another officer. The other officer came in and put me in the cell.

Q. Did there come a time when you were called out of that cell and into the room again?

A. I was called out again.

Q. Who was there when you were called into the room the second time?

A. Officer they called Taylor.

Q. He is the narcotic officer of the Metropolitan

221 Police Department? Is that the Taylor you mean, the man who testified on the stand?

A. The same Taylor who was here on the stand.

Q. After Taylor arrived did there come a time when some other agents arrived?

A. They did; yes, sir.

Q. After the other agents arrived did you see the officers initialing any of these packages?

A. Well, they were writing on them.

Q. I mean writing on them.

A. Yes.

Q. Where did that writing take place?

A. In the same room where I was at.

Q. In this little room you refer to?

A. Yes, sir.

Q. Did you see Officer Harper writing on them in that room?

A. They all wrote, one after another.

Q. When this box was given to you about a mile and a half from Laurel, Maryland, was the matchbox containing the needles also in the larger box?

A. I didn't look in the—I didn't look in the matchbox. The matchbox was in there, but I didn't look at it.

Q. You mean the match box was in there?

A. Yes.

222 Q. You did not put the needles in the matchbox, did you?

A. No. I didn't look in the match box at all. I only looked at one of those boxes.

Q. When you were confronted by the police in this station and they asked you about this box being found in the rest room, what did you tell them?

A. I told them they were not mine.

By the COURT:

Q. Told them what?

A. At the precinct.

Q. You told them what?

A. At the precinct.

Q. What did you tell them?

A. I told them it wasn't my box.

Q. It was not your box?

A. Yes, sir.

By Mr. BUCKLEY:

Q. Why did you tell them that?

A. Because I know it was United States property and I didn't want to have it put on me, because it was none of mine, and I didn't understand what it was all about, and I didn't want to be owning something I didn't know what it was all about.

Q. But you had seen something on there that it was
223 property of the Government, hadn't you?

A. Yes; I had.

Q. Did the officers at the station ask you anything about where you got the box from or anything about who gave you the box, or anything?

A. They didn't ask me.

Q. Frazier, in 1938, you were convicted, were you not, of violation of the Marijuana Tax Act?

A. I was.

Q. What is your occupation now?

A. I have a restaurant, cafe.

Q. How long have you been conducting that restaurant?

A. Well, I have been—I was in the delicatessen business at the time this trouble happened, and I have been in the delicatessen business——

Q. Where was that delicatessen located?

A. 4920 Central Avenue, Northeast.

Q. You are now located where?

A. 5635 Eades Street, Northeast.

Q. That is a restaurant there?

A. That's right.

Q. You own the business?

A. Yes. I cook there every night.

Mr. BUCKLEY. That is all, sir.

224 Cross-examination by Mrs. STILES:

Q. Now, you say that this box containing this morphine and the hypodermic needles were given to you by two soldiers that you picked up on the way from Baltimore?

A. Those boxes were. I don't know what it contained. It was given to me—those boxes.

Q. Didn't you say that one of the soldiers opened the box and showed you what was in them?

A. No; he didn't open the box and showed me what was in it. He gave me the box.

Q. On direct examination you made the statement that the soldier opened the box and showed you what was in it?

A. No, no. He opened the big box,

Q. He opened the big box?

A. And took this small box out.

Q. And he took the small box out?

A. That's right. He was trying to show me it wouldn't be any trouble. That's what he was trying to show me—that it wouldn't be any trouble to keep it until he came in town.

Q. Wouldn't be any trouble what?

A. It wouldn't be any trouble to me if I kept it until he came in town. That's why he showed me the reading on the box.

Q. You were to keep it until he came to town?

225 A. That's what he wanted me to do.

Q. Why couldn't he keep it?

A. He said he couldn't carry it where he wanted to go; he couldn't keep it at camp, and one thing and another.

Q. Why did he ask you to keep it?

A. Well, I don't know why, why he wanted me to keep it. He had to find out where I lived, and one thing and another, and asked me to keep the box until he came to town.

Q. Did you tell him you were in the habit of keeping narcotic drugs for people?

A. I didn't know it was narcotics.

Q. Answer my question.

A. No; no.

Q. Did you tell him you were in the habit of keeping narcotic drugs for people?

A. No.

Q. You did not tell him that?

A. No.

Q. What reason did he give for asking you, whom he had never seen before, as I understood you say, to keep this box of

morphine for him until he came in town? What reason did he give for asking you to do that?

A. He asked me where I lived, and I told him where I lived and I told him about my business, and one thing and another.

226 Q. Talk a little slower, so we can hear you.

A. He said, "I can find you easy, then. Would you mind keeping the box for me until I come in town?"

Q. Did he tell you what was in the box?

A. No; he didn't tell me what was in the box. He only showed me the box from the reading on the outside, and I read it.

Q. Did you know from the reading on the outside what it was, what it was to be used for?

A. Supposed to be used for soldier.

By the COURT:

Q. You said a moment ago you did not know what it was.

A. I said on the outside of the box it says it is to be used for soldier.

Mr. BUCKLEY. If I understand the Court, I asked him if he had opened the box, and he said no. Then I showed him the little box. He said he did not open the little box to see the contents, but he read from the label on the outside what it was.

The COURT. He just answered Mrs. Stiles that he did not know what was in it. Does not the box itself say what it was?

Mr. BUCKLEY. He testified, my understanding is, on direct examination that he read from the box that the box contained narcotics.

The COURT. Exactly. Now, perhaps I am wrong, but
227 I thought he just answered Mrs. Stiles a few moments ago that he did not know what it contained.

Mrs. STILES. He did.

The COURT. He did not know what it was.

By the COURT:

Q. What is the fact of the matter? You read that box, you say?

A. Yes, sir; I read on the outside.

Q. Didn't you know what was in it?

A. I mean, from the reading of the outside box, it says narcotics, but, I mean, what was actually in the box I don't know.

Mr. BUCKLEY. He means he did not see the narcotics. That is what he means.

The COURT. The jury will tell what he means.

By Mrs. STILES:

Q. Now, let us get this straight. You say the soldier opened the box and showed you what was in it? Didn't you testify to that on direct examination?

A. He opened the big box.

Q. He opened the big box?

A. And taken one of these little boxes out.

Q. And took out one of these little boxes?

A. Yes.

Q. And you read what it said on the outside of the box?

228 A. Yes, sir.

Q. And you read what it said on the outside of the box, the wording, "solution of morphine tartrate?"

A. I read what was on the outside of the box, yes, ma'am.

Q. You knew what it was in that box, didn't you?

A. I don't know what morphine of tartrate is.

By the COURT:

Q. What is that?

A. I said I don't know what morphine tartrate is.

Q. You do not know what morphine is or you do not know what morphine tartrate is?

A. I don't know what morphine tartrate is.

Q. You know what morphine is?

A. I know what morphine is.

Q. Did you know what morphine was when you say they gave you the box?

A. Oh, yes. I know what morphine is.

Q. Then, you knew, did you not, that they were giving you a package of drugs?

A. No; at the time I didn't know they were giving me a package of drugs.

Q. What did you think it was?

A. From the way he told me, it was something soldiers were supposed to have, but he didn't want to carry it around; would I keep it for him.

By Mr. BUCKLEY:

Q. When you say "morphine" on the box you knew it contained morphine, didn't you?

A. Yes; from what it said on the box, I figured it was morphine. I mean, I thought he was supposed to have it.

By the COURT:

Q. If your answer to your lawyer's question is "yes," what did you mean when you said a few minutes ago that you did not know what was in it?

A. Just like the match box. They said there were needles in the match box. At the time I saw the match box I thought it was matches in the match box. The writing on the outside of the box——

Q. Where did you let these men off?

A. I let them off at Florida Avenue and New York Avenue—where you make the cross there.

Q. There were two men?

A. Two men.

Q. You never saw them before?

A. I never saw them before.

Q. Where were you arrested?

A. I was arrested at 40—no; Minnesota Avenue and Benning Road.

Q. About how far from Florida Avenue and New York Avenue was that?

A. I don't know how many blocks that is.

Q. It is quite a distance?

A. It is quite a distance.

Q. And after you let them out and before you were arrested you did not look in the box to see what was in it?

A. See, I wasn't arrested right after I left them.

Q. After you let them out and between that time and the time you were arrested you did not look in this big box to see what was in it?

A. No, sir.

Q. You did not look in the little box to see what was in it?

A. I didn't look in the little box. It stood in the case in the car.

Q. You were not curious about it?

A. No; I didn't think any more about it.

The COURT. That is all I want. Go ahead.

By Mrs. STILES:

Q. You said you were about a mile and half out of Laurel before the soldiers gave you this box; is that correct?

A. That's right.

Q. What was your conversation before he gave you this box? What led him up to giving you this box?

A. What led up to him giving me this box?

231 Q. Yes.

A. Well, after we started talking—first he started talking about the automobile. That's the first thing he started talking about. He said when he got out of the Army he was going to get him an automobile, and one thing and another.

After a while further he said, "What are you going to do with these bags?"

I said, "I am going to take them in town."

He said, "You've got a business"—one thing and another—"This fellow has a business. Maybe you can find him at night. Maybe he can keep it."

I said, "What is it?"

He said, "I've got a box. Will you keep it until I come in town?"

Q. What kind of business?

A. Delicatessen business. I knew he could find me at all times.

Q. What kind of business?

A. Delicatessen store.

Q. You did not tell him you had a narcotic business?

A. No; no.

Q. You did not tell him that?

A. No.

Q. Isn't it true that up to that time you had been
232 talking about the narcotic business?

A. No.

Q. And that led up to his giving you these things?

A. No; we didn't talk about narcotic business at all.

Q. Your testimony is that he simply gave you these things to keep until he came in town?

A. That's right

Q. You knew they were morphine? Didn't you testify to that?

A. From the outside of the box, it was morphine.

Q. If what you are telling us now is true, why didn't you tell the officer this story at the time he arrested you?

A. Because I didn't know exactly the weight the box carried. It was some United States property. I didn't know what it was all about.

Q. Did you think there was anything wrong about your taking those boxes?

A. I felt as though I was doing somebody a favor—I felt like I had taken some weight on myself, having United States property on me.

Q. Why were you doing a favor for somebody you had never seen before?

A. Just like I picked them up at hitchhiking. I was doing them a favor.

Q. Why did you think you were doing them a favor
233 to keep something that belonged to the United States Government?

A. I don't know why I was doing it, but they were soldiers, and during the whole war I tried to do what I could for them, like any soldier. I tried to do them a favor.

Q. You stated on direct examination, as I got it, that when you went to number 11 precinct the police handed you one of these boxes; is that correct?

A. He opened the big box and took one box out and handed it to me and asked me what was it, and I told him I didn't know.

Q. Why did you tell him you did not know?

A. Because I still don't know.

Q. You just said you knew it was morphine.

A. It is supposed to be morphine, but I don't know. I don't know what it is.

Q. You know what morphine is, don't you?

A. Well, he seen it on the box himself.

Q. Didn't you just say you had been convicted in 1938 of a violation of the Harrison Narcotic Act?

Mr. BUCKLEY. Marijuana Tax Act.

A. Marijuana—cigarettes.

By Mrs. STILES:

Q. Weren't you also convicted of a violation of the Harrison Narcotic Act?

The COURT. I cannot hear you, Mrs. Stiles. When?

234 Mrs. STILES. In 1937.

The WITNESS. That is right.

By Mrs. STILES:

Q. The Harrison Narcotic Act is an Act covering narcotics, isn't it?

A. I suppose it is.

Mr. BUCKLEY. If Your Honor please, Mrs. Stiles knows better than that. The Marijuana Tax Act is not the Harrison Narcotic Act.

Mrs. STILES. He just admitted——

The COURT. She is asking him not about the Marijuana Tax Act, but the Harrison Narcotic Act. She is asking him whether or not in 1937 he was convicted for a violation of the Harrison Narcotic Act. He said he was. That has nothing to do with the Marijuana Tax Act.

Mrs. STILES. I asked him that in addition. He also said he was convicted of the Marijuana Tax Act.

The COURT. Proceed. He answered the question.

By Mrs. STILES:

Q. Isn't it true that instead of what you have been telling us here, you bought this morphine from these soldiers?

A. No, ma'am.

Q. Let me ask you one more question. When you went into this rest room was this box—You said it was in the compartment of your car; is that correct?

235 A. It was in my car, in the front where you keep your things, in the front of the car—in your dashboard.

Q. And you put it in your pocket and took it into the rest room; is that right?

A. That's right.

Q. Why did you try to hide this if you felt there was nothing wrong about it?

A. Well, I knowed that be belonged to the United States Government, and I thought it was soldiers that was supposed to have stuff that belonged to the United States Government. In between time I was trying to do a fellow a favor.

Q. If it belonged to the United States Government what right did you think the soldier had to have it and give it to you? If you thought it belonged to the United States Government what right did you think the soldier had to have it and give it to you?

A. Well, I thought he had a right to have it.

Q. Did you think he had any right to have it if it belonged to the United States Government?

A. Yes; because he was one of the United States Government men.

Q. If you thought he had a right to have it and he had a right to give it to you to keep it for him, why didn't you tell that to the officer?

A. Well, I didn't know at the time what I would be
236 getting myself into.

Q. In other words, you knew that you had no right to have it?

A. I know I done wrong by having it. Civilians weren't supposed to have it.

Q. If you knew you "done wrong by having it," why did you take it from the soldiers?

A. I am telling you now I was trying to do him a favor, not thinking that I would have that much trouble with it.

Q. Was he going to leave it with you and come back and buy it from you?

A. No; no. He was going to come and get it that night, he said, but he didn't want to carry it all day in town.

Q. Did he say what he had four boxes of morphine for?

A. No, he didn't say what he had it for. He didn't say.

Mrs. STILES. I have no further questions.

• • • • •

237 A. That's right.

Q. All the same arrest?

A. That's right.

By the COURT:

Q. The question is, Did they involve the Harrison Narcotic Act and the Marijuana Tax Act—both of them?

A. Well, I don't know. Marijuana was what they charged me with.

Re-cross-examination by Mrs. STILES:

Q. You were also charged with a violation of the Harrison Narcotic Act, too, weren't you?

A. Well, if it was carried as the Harrison Narcotic Act, I don't know. They charged me with marijuana.

The COURT. Was that in this Court?

Mrs. STILES. Yes, Your Honor.

The COURT. Is that all?

Mrs. STILES. That is all.

(The witness left the stand.)

The COURT. Is that your case, Mr. Buckley?

Mr. BUCKLEY. Yes, Your Honor.

The COURT. Do you have anything else, Mrs. Stiles?

Mrs. STILES. No; Your Honor.

(Counsel for both sides approached the bench, and the following occurred:)

238 Mr. BUCKLEY. Since the defendant has testified that where he came into this possession was a mile or two miles out of Laurel, Maryland, now I say that the Government has failed to maintain its case.

The COURT. Suppose the jury does not believe him? The presumption does not go out of the case when his evidence comes in. His evidence does not displace presumption. Suppose they do not believe him? If they do not believe him, the presumption stays in.

Mr. BUCKLEY. You mean after he has testified that he did not receive these things in Washington, D. C., that presumption still exists that he did?

The COURT. If they do not believe him, of course.

Mr. BUCKLEY. This presumption if he does not testify; then goes to certain things. It is a prima facie case.

The COURT. Do you mean that all he had to do is to take the witness stand and tell the most incredible story you have ever heard? It is the most incredible story that you have ever heard.

Mr. BUCKLEY. That is the story that he tells. I do not believe the part about his not knowing what was in it, but I do believe that part of the story about Laurel, Maryland.

The COURT. Suppose the jury does not?

Mr. BUCKLEY. I still think he is covering the identity of the parties that he got it from out there, and I do believe
239 that these things came from where the man was stationed at Fort Meade.

The COURT. If they believe him, he is not guilty. If they do not believe him, the presumption is still in the case. The jury may believe that the presumption has been destroyed hinn his testimony. The jury may believe that he has testified falsely. That is all there is to it. If the mere taking of the witness stand and telling the most incredible story would be enough——

Mr. BUCKLEY. I understand that, but here is a man who says these things were given to him in Laurel or nearby Maryland. He said something about he knew they were the property of the Government. He says he got rid of them or denied ownership of them at the time. He now says that he looked at the box and he saw the label on the box and he saw "morphine" on there.

From that testimony I still say that it has not been proven that this man had knowledge that it was not legal.

The COURT. I understand your point. I do not agree with you. Are you making a motion now for the record?

Mr. BUCKLEY. I am making a motion for the record for a directed verdict and a motion for acquittal.

The COURT. Motion denied.

Mr. BUCKLEY. At this time I would like to renew a motion that I did make in the very beginning, about the method
240 by which this particular panel was selected on the first Tuesday of October.

The COURT. I will deny that.

Mr. BUCKLEY. And I submit this and I ask Your Honor to direct a verdict on the ground that in this case his testimony should be believed as to where he received this, because of the fact that it is my contention that since it is manufactured by Squibb & Company, they are from, not in, but from the original stamped package, and no presumption should even arise.

The COURT. I deny that motion.

Mr. BUCKLEY. Your Honor will allow me an exception, of course, to all of these?

The COURT. Motion denied.

DISCUSSION ON PRAYERS FOR INSTRUCTIONS TO THE JURY

The COURT. Defendant's prayer for instruction number one is granted in substance.

Numbers 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 are denied.

Number 12 is granted in substance.

Number 13 is granted in substance.

Government's prayer number one is granted in substance.

Mr. BUCKLEY. Will Your Honor allow me an exception to those which were denied?

The COURT. Yes. That will be all.

241 (Counsel for both sides resumed their places at the trial table, and the following occurred:)

The COURT. Proceed, Mrs. Stiles.

OPENING ARGUMENT ON BEHALF OF THE UNITED STATES

Mrs. STILES. May it please the Court, ladies and gentlemen of the jury, this case has been a little dragged out, but when you come down to the simple facts in the case, you have just one point to determine.

As I told you in the beginning, there were two parts in the indictment, one of which the Government would abandon, because that part which charged violation of the statute in connection with the vial of codeine tablets we could not support by evidence, because the codeine tablets did contain a tax stamp.

As I told you in the beginning, the defendant is charged in the indictment with a violation of Section 2553 (a) of the

Internal Revenue Code—that is the Harrison Narcotic Act that you have heard referred to—in that he, the said Robert Frazier, did then and there, knowingly, wilfully, unlawfully, and feloniously, purchase, sell, dispense, and distribute, a certain narcotic drug, to wit, 19 one-half grain syrettes of morphine tartrate, and 20 one-half grain codeine sulphate tablets, which said narcotic durgs were not then and there in or from the original stamped package containing said narcotic
242 drugs.

Now, as I told you, the codeine did contain a tax stamp, as you see. Therefore, the only question before you involved the 19 one-half grain syrettes of morphine tartrate.

* * * * * *

277 CHARGE TO THE JURY

The COURT (SCHWEINHAUT, J.). Members of the jury, I caution you again that the indictment is not evidence in the case and is not to be considered by you as anything but the formal accusation of crime.

This defendant, as all defendants in criminal cases, is presumed to be innocent. That presumption remains with him throughout the trial, and it prevails until and unless, in your final deliberations, you are convinced of his guilt beyond a reasonable doubt. The burden, therefore, is upon the Government, and not upon the defendant, to establish its case.

A reasonable doubt, as you often now have been told, is a doubt based upon reason arising out of the evidence or lack of evidence in the case. It is such a doubt as, after a fair and full consideration of all the evidence, will leave a juror's mind so undecided that he does not have an abiding conviction of guilt, that is, a settled conviction of guilt which he believes will remain unshaken by future thought and reflection. It is such a doubt, for instance, as would cause a reasonable, thoughtful, and prudent person to hesitate to act, through feelings of uncertainty, if confronted with a matter of importance concerning his own affairs.

Such a doubt does not arise from a mere whim, caprice, speculation, or conjecture, nor from a reluctance to
278 convict through feelings of sympathy or mercy. It is a conscientious belief, arising after calm, dispassionate,

impartial, and thoughtful consideration of all the evidence that there is reason to doubt the defendant's guilt.

Of course, such a doubt does not imply proof beyond all doubt. Happenings between human beings usually cannot be proven to an absolute certainty. Therefore, the law does not require it. It does, on the other hand, require that no such person shall suffer the loss of his life, his liberty, or his good name unless his guilt is established beyond such a doubt; and if, upon the whole evidence, there is a reasonable hypothesis or theory consistent with innocence, it is your duty to find the defendant not guilty.

Putting it another way, if from the evidence in the case there are two theories that you can take equally consistent on the one hand with guilt and on the other hand with innocence, you must take the one most favorable to the defendant.

Now, in judging of the credibility of witnesses, you must take into account, and you should, the manner and the demeanor and the conduct of witnesses on the stand and the plausibility or implausibility of their testimony to you as people who understand human nature and human events. Decide whether or not the stories are plausible or implausible. Now, in so doing, if you believe that any person who testified in the case testified falsely with respect to a matter con-
279 cerning which he could not reasonably be mistaken, you may disregard all or any part of the testimony of that person.

Now, in connection with that same subject, evidence in this case has been received touching upon the prior conviction or convictions, as the case may have been, of the defendant for violation of the narcotic laws. That, as you have been told by counsel on each side properly, is not to be considered by you as evidence of guilty in this case; but it is a matter which may or may not, as you view it, bear upon the credibility of the defendant when he made a witness of himself and testified. The question is whether or not you believe that a person, having been convicted before of crime, is as worthy of belief as anyone else. That is a fact, like all other facts in the case, which you are to resolve and determine.

The indictment has also been explained to you, and it is a simple enough one. It charges that this defendant on the 19th of April 1944, within the District of Columbia, violated the requirement of a section of the Internal Revenue Code, the narcotic law, in that he then and there, knowingly, wilfully, and so forth, did purchase, sell, dispense, and distribute certain narcotic drugs, to wit, some morphine, 19 one-half grain syrettes of morphine, which drugs were not then and there in or from the original stamped package containing said narcotic drugs.

The indictment, therefore, sets forth the elements
280 of the offense. This must have occurred in the District of Columbia. It must be morphine. It need not be 19 one-half grains specifically, though I think there is no dispute in the evidence as to that, and that they were not in the original stamped package.

Now, as counsel have told you, each of those elements must be proved, and must be proved beyond a reasonable doubt.

The Government relies for part of its proof of the elements of this offense upon what is known as a legislative presumption. The Congress, realizing that it is frequently difficult, often impossible, to actually prove by testimony, by evidence, these elements, put into the statute what is known as, as I have told you, a legislative presumption, a presumption, therefore, which takes the place of evidence.

Now, that presumption reads as follows:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in Section 2550 (a)," which is a prior section and which includes morphine, as this indictment charges, "except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found."

With respect to that presumption, the Government has
asked me to charge you, and I do so because it is sub-
281 stantially the law, as follows: If you believe the defendant had possession of the 19 one-half grain syrettes

of morphine tartrate and that there were no Internal Revenue tax stamps upon them at the time they were in his possession, then you are entitled to find that he committed the violation charged in the indictment. The Government is not required to prove that the defendant committed the particular offense in one of the particular ways alleged in the indictment—that is, purchasing, selling, dispensing, or distributing said morphine tartrate syrettes.

I add, in that respect, this. There are certain transactions which are specifically exempted from the necessity of bearing tax stamps. One of them is a transaction by the Government itself. When the United States, in the exercise of its official duties, engages in dispensing narcotics, it is not required to pay the tax. The burden is on the defendant to show that he is in the class of one who has the right to possess narcotics that do not bear the stamps.

The defendant has asked me, through his counsel, to charge you as follows, which I do. Well, I have already done that. Where the facts are as consistent with innocence as they are with guilt, then the verdict must be not guilty, and you are charged also that each and every element of the offense must not only be charged in the indictment but each and every
282 element of the offense must be proved by the Government beyond a reasonable doubt.

As I said, the Government relies for part of its proof upon this legislative presumption, which takes the place of evidence.

Now, all this may sound technical or perhaps confusing. Actually it is not. This case is simple.

If you believe the defendant's statement of what occurred, namely, that two soldiers gave him these boxes of drugs to keep for them in Maryland, he is not guilty. If you do not believe his story, then the presumption which I have referred to is sufficient to authorize conviction.

The case is as simple as that. So you determine that fact, and you will have to determine the case.

Is there anything else, gentlemen?

Mrs. STILES. The Government has none.

Mr. BUCKLEY. May we approach the bench?

A. Well, yes.

Q. Tell His Honor what Mr. Babcock told you. Tell
293 it in Mr. Babcock's own words as best you can recall them.

A. Mr. Babcock, when they originally put the syrettes up for the Army Medical Department, went to Commissioner Anslinger, the Commissioner of Narcotics here, for permission to purchase the morphine to put in these syrettes; and he was in turn told by the Commissioner that the Malinkrodt Chemical Company had a supply of morphine there that they would supply to the Squibb Company to put into the syrettes.

Now, Squibb did not manufacture that morphine. They merely got that morphine from the manufacturing company, which was Malinkrodt, and put it into the syrettes.

By the COURT:

Q. The Government did not own the narcotics in the first instance, then, did it? The Malinkrodt Company owned it?

A. So far as we have been able to find, the narcotics were manufactured by the Malinkrodt Company, yes, sir.

By Mr. BUCKLEY:

Q. Did Mr. Babcock say anything to you or did you ask him about whether or not, in his opinion, the taxes had been paid by Malinkrodt Company at the time there were manufactured?

A. Oh, yes. He said it was safe to assume, it was his assumption, that the taxes had been paid, because of the fact that if they had not been paid, a reputable firm would not supply the morphine to them.

294 Q. Did Mr. Anslinger arrange this whole thing?

A. Mr. Anslinger arranged the transaction after the Squibb people had asked him for permission to purchase the morphine; and he said the Malinkrodt Company had the morphine there and they had manufactured the morphine and they were supplying it.

Q. Did Mr. Babcock say Mr. Anslinger arranged to have these narcotics sent to Squibb & Company?

A. It was on a letter of authorization from Mr. Anslinger.

Q. And he is Commissioner of Narcotics?

A. Yes, sir.

Mr. BUCKLEY. That is all.

Cross-examination by Mrs. STILES:

Q. As I understand that strip you referred to on there, that, you said, was in lieu of the tax stamp; is that correct?

A. Yes, ma'am. That was Mr. Babcock's statement. I asked him about it.

Q. That was on these particular syrette boxes that were made for the Government?

A. That was on all the boxes that contained these syrettes. There's been no other boxes made for anyone other than the Government as yet. They are coming out shortly on the market.

295 Q. They have not made these for commercial use?

A. They have made them for commercial use, but they have not put them on the market as yet. They have manufactured them for commercial use.

Q. Would you go into where the tax stamp would be on those that would go on for commercial use?

A. I can't answer that. It is my assumption that they would be where that strip is now.

Q. Where the strip is now on those made for the Government?

A. Yes.

Mrs. STILES. That is all.

Mr. BUCKLEY. That is all.

(The witness left the stand.)

Mr. BUCKLEY. If your Honor please, I submit the source of these narcotics was known to the narcotic people. It had to be if Mr. Anslinger arranged it; and I submit that up to the time of this trial there was no burden on the defendant to trace any source of the narcotics. However, he did find himself in the position, after he was convicted, where it became not only incumbent upon him but very important to him that he have someone go and start searching the source of these narcotics.

The COURT. Your position, I take it, narrows down to this: that that, within the meaning of the law, is an original
296 stamp tax.

Mr. BUCKLEY. Yes, sir; I do; and I say that under 2553, where it says stamps or other methods, that signifies the other method.

The COURT. What do you say to that?

Mrs. STILES. I say that is not true, your Honor. That was not a tax stamp, but it was narcotics put out by the Government, and there is a specific statute which exempts the Government from stamping narcotics when they put them up, and therefore they were not in a tax-stamped package.

I think that is the only exception. The Government is the only one that can put up these narcotics without putting stamps on them. Now, that was not in lieu of the stamp. There wasn't any stamp, because the Government did not have to use one. There was no such exemption given to anyone else, certainly not to the person having the narcotics.

I say that it makes no difference if these narcotics originally came out of a stamped package. That has nothing to do with it. The section says very specifically that the person in whose possession it is found shall have a tax stamp on it. Otherwise he is violating the statute. It can't go back any farther than that.

It is quite plain, under the law, that when Squibb puts these syrettes out for commercial use, they will have a tax stamp on them, because the statute provides, and there is a
297 regulation under that statute which says this. I am citing from the Code of Federal Regulations, Title 26, Section 151.48, on page 1168, which says that:

"A new tax liability will attach whenever a new derivative, compound, or preparation is produced, whether or not tax has been paid on the component ingredients or parts thereof. Thus, imported opium is subject to one tax, morphine produced in this country from such imported opium is subject to another tax, a preparation manufactured by the use of such morphine also will be subject to tax," and so on.

That is what the regulation says. I submit that this company out in St. Louis that manufactured this morphine undoubtedly pays a tax on it. I have no facts on it. When Squibb took that morphine and put it in the syrettes in this form, if it had been doing that for commercial use it would have put a

stamp on it; and the only reason it was not put on there was that it was producing this for the Government and the Government is specifically exempted.

Now, the Government does not exempt anyone who got hold of that, unless it was probably some one in the medical branch of the Army who could show that he was the Government or representing it. It certainly does not exempt anyone else, and the statute says if anyone is found with narcotics in his possession, not in or from a tax stamped package, is liable under the statute.

298 The COURT. He has got to explain how he comes to be in possession of one that does not have the stamp.

Mrs. STILES. That is right, and the fact that this did not have any makes no difference whatsoever. The Government did not have to put one on.

Mr. BUCKLEY. In answer to Mrs. Stiles, under Section 2553 (a)—and that is the only one this man is prosecuted under—the tax is paid by one of four persons; the importer pays a tax; the manufacturer, if he manufactures, pays a tax; the producer; or the compounder. Somebody has to pay the tax on the stamp.

In the case of *Nigro* vs. *U. S.*, Circuit Court of Appeals, from Missouri, 117 Federal (2nd) 624, it was stated:

"Section 2553 (a), Title 26, U. S. Code is a revenue measure and the tax is imposed not upon the retail purchaser for his own use, but upon importers, manufacturers, producers, dealers in and practitioners, and the provisions of this Act are directed toward the collection of the revenue or taxes imposed and the prevention of the evasion of tax by the persons subject to the tax."

What persons are subject to the Tax? The persons who manufacture it. Malinkrodt are the ones who are subject to the tax in that sense, because Squibb & Company has told Mr. Bradley from what manufacturer they got it; and it was all arranged by Anslinger, by his authority, that Malin-
299 krodt sent it to New York to Squibb & Company to be put up in these packages.

The COURT. Mrs. Stiles admits for the sake of this argument that all that is true and says it does not make any difference

(Counsel for both sides approached the bench, and the following occurred:)

Mr. BUCKLEY. I understood Your Honor to say in your charge that these syrettes—if the jury finds that they are not in the original stamped package——

The COURT. In or from.

Mr. BUCKLEY. I put down what you said, that they are not in. I do not know whether you said "from." You did later on.

283 The COURT. I am sure I did. What is the point?

Mr. BUCKLEY. You should have said, "either in or from the original stamped package."

The COURT. I will be glad to do that.

Mrs. STILES. That presumption, of course, says that they shall have appropriate tax stamps.

The COURT. I understand. I will take care of that.

(Counsel for both sides resumed their places at the trial table, and the following occurred:)

The COURT. It is thought that I did not specifically make clear one place in this matter. Counsel has asked me to instruct you again concerning it.

You must find, in order to find the defendant guilty, that he was in possession—literally, that he purchased or sold or dispensed or distributed narcotic drugs which were not in or were not from the original stamped package. That, of course, you must find.

As I have told you twice now, the Government relies for proof of that not upon evidence that someone saw him purchase or sell or distribute or dispense, but relies, rather, upon this presumption of law—legislative presumption—that possession of the boxes which did not have a stamp on takes the place of direct evidence of either one or all of those.

I do not see why there need be any puzzle in respect to that.

Here is perhaps a simple way to put it. If you have
284 in your possession a package of drugs which does not have an Internal Revenue tax stamp or if you have in your possession drugs which did not come from a package containing the original Internal Revenue tax stamp on it, you then have got to explain satisfactorily to a jury how you got

them, where you got them, and how it happens that you are in possession of them.

It is simple enough. Therefore, I say, as I said before, the defendant has got to explain it; and if he has explained it to your satisfaction, he is not guilty. If he has not explained it to your satisfaction, this presumption is sufficient to warrant a conviction in the case.

That, I think, is ample.

Mr. BUCKLEY. Would Your Honor instruct the jury with respect to knowledge?

The COURT. Yes. I have already done so. I have told them the elements in the case. Each of them they have to find; that he knowingly had it; that he knowingly purchased, sold, distributed, or dispensed in the District of Columbia; it had to be morphine, in 19 one-half grains, or substantially that; and that they were not in or that they were not from the original stamped package.

I have to make it complete. I cannot make it in pieces. I have to tell them again.

The defendant tells you how he got it. If you believe
285 him, he is not guilty. If you do not believe him, then the Government is not required to prove that someone saw him purchase them in the District of Columbia or that someone has to testify that he knowingly did this or that he knowingly had this in his possession. The presumption takes care of all that for the Government. So, again, if you believe what he told you, he is not guilty. If his story does not satisfy you, if you do not believe it, he is guilty.

You may take the case.

(Whereupon, at 10:25 a. m., the jury retired to consider its verdict.)

(At approximately 3 p. m. the jury returned to the courtroom and the following occurred:)

The DEPUTY CLERK. Mr. Foreman, has the jury agreed upon a verdict?

The FOREMAN. We have.

The DEPUTY CLERK. What say you as to the defendant, Robert Frazier? Guilty or not guilty?

The FOREMAN. Guilty.

The DEPUTY CLERK. Members of the jury, your foreman says that you find the defendant, Robert Frazier, guilty, and that is your verdict, so say you each and all?

(The jury indicated in the affirmative.)

The COURT. Let the defendant be committed.

(Thereupon the instant hearing was concluded.)

* * * * *

287 PROCEEDINGS

MOTIONS FOR NEW TRIAL AND IN ARREST OF JUDGMENT

Mr. BUCKLEY. May it please the Court, I have in this case a motion for a new trial and also a motion in arrest of judgment.

Since this case was tried and since the verdict was returned, I have sent a man to New York to try to trace the source of these narcotics and where they came from. That man is here in court, and I would like to put him on the stand and let him explain to Your Honor just what he has determined from this investigation——

The COURT. Very well.

Thereupon——

JOHN E. BRADLEY was called as a witness and, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. BUCKLEY:

Q. What is your full name?

A. John E. Bradley.

Q. Where do you live, Mr. Bradley?

A. In Silver Spring, Maryland.

Q. Mr. Bradley, directing your attention to Wednesday a week ago, did there come a time when you left here and

288 went to New York City?

A. I did; yes, sir.

Q. In New York City did you go to Squibb & Company?

A. Yes, sir.

Q. With whom did you talk or have a conversation there?

A. I contacted Mr. A. W. Babcock, who is the manager of the Government Department of Squibb & Company.

Q. Mr. Bradley, what business are you in?

A. I am a confidential investigator.

Q. Prior to that were you in the service?

A. I was; yes, sir.

Q. During the time that you were in the service did you or did you not testify in these courts for the Government?

A. I did; yes.

Q. You were connected with the Military Police branch of the Government?

A. Provost Marshal investigation.

Q. Since you have been an investigator in your own capacity, in your own business, have you been called by the Government as a witness and testified for the Government?

A. I have.

Q. Mr. Bradley, did you discuss with Mr. Babcock at Squibb & Company the subject of the small boxes in which syrettes were put up by that company?

A. I did; yes, sir.

289 Q. Did you inquire of Mr. Babcock from what source Squibb & Company got the narcotics that they put up in these syrettes?

A. Yes, sir. We traced that back to the——

Mrs. STILES. I do not like to interrupt and I do not want to interfere with any information Your Honor desires to get in this matter, but I submit that anything that this gentleman in New York told this witness is not really admissible.

The COURT. It is hearsay. It would not be admissible in a trial. I am called upon now to decide whether there should be a new trial, at which this end will be explored. I think it is proper for that purpose.

Mrs. STILES. Very well, Your Honor.

The WITNESS. Will you read the answer as far as it went?

The REPORTER (reading). "Answer: Yes, sir. We traced that back to the——"

The WITNESS (continuing). Malinkrodt Chemical Company.

Mrs. STILES. Will you speak a little louder?

The WITNESS. Yes. I have a little laryngitis, Mrs. Stiles.

By Mr. BUCKLEY:

Q. Where is that company located?

A. The factory of that company is located in St. Louis, Missouri.

Q. Tell the Court what Mr. Babcock told you with
290 respect to these boxes being labeled and flaps being put on them.

A. The boxes containing the five syrettes were prepared——

Q. Keep your voice up.

A. Were prepared for the Army Medical Corps by the E. R. Squibb & Sons with morphine that was furnished to them by the Malinkrodt Chemical Company.

On these boxes they have a sealed flap, which, as Mr. Babcock explained it, is in lieu of a tax stamp or strip. That is, it serves the same purpose as a strip or stamp.

Q. On each of these small boxes that flap or strip is placed?

A. That is right, on each individual box.

Q. Is that flap or strip placed, from Mr. Babcock's explanation, at the same time this box is labeled, and so forth?

A. That is right. The label is placed and then the seal is placed on the box.

Q. Directing your attention to last week or the early part of this week, did there come a time when you and I went to Mrs. Stiles' office to examine these boxes?

A. We did.

Q. Was it plain to see on the boxes where the strips had been?

A. Yes.

291 Mrs. STILES. Those boxes are in my office.

Mr. BUCKLEY. Can we get the boxes down, so he can explain?

Mrs. STILES. I think, if we are going to go into this, we had better get the boxes.

The COURT. I think we had better. I will take a recess. By that time have them here and examined so we can proceed a little more quickly.

(A short recess was had.)

The COURT. I remember what the boxes look like, so if you will direct your inquiry to that, let us proceed. Give me one and give him the other.

By Mr. BUCKLEY:

Q. I will show you one of these boxes, Mr. Bradley. Will you explain to His Honor what Mr. Babcock explained to you about the flap or the strip, as he calls it [handing an article to the witness].

The COURT. S-t-r-i-p, is that?

By Mr. BUCKLEY:

Q. Is that what it is?

A. A sealed flap, is what he calls it.

The COURT. Sealed flap.

The WITNESS. You can see part of the flap on all of these boxes. As you can see, they come from here over the top of the box, and around to where approximately—I would
292 say a quarter of an inch over the opposite side—that is, across the end—just sealed across the end.

By the COURT:

Q. I show you one. Is this the flap you are talking about [indicating]?

A. That is evidently the bottom part of the flap.

By Mr. BUCKLEY:

Q. That is on each of the boxes, too?

A. That is on each one of the boxes.

By the COURT:

Q. What is the significance of that flap?

A. This flap, as Mr. Babcock explained to me, is in lieu of a tax stamp or strip, inasmuch as it serves the same purpose——

Q. Is there any legend or was there any legend on the flap?

A. That I can't answer, sir. I was under the impression that he told me that there was, but I can't definitely say that there was.

By Mr. BUCKLEY:

Q. Did Mr. Babcock tell you or explain to you about how Squibb & Company got these narcotics from the Malinkrodt Manufacturing Company in St. Louis?

whether it is or not, because this man had a non-tax-paid package and it falls upon him to explain what right he has to this non-tax-paid package.

Mr. BUCKLEY. These taxes came from the manufacturer. If the taxes are paid, that is where they came from. They do not have to be both "from" and "in." If it came from Malinkrodt Company, certainly a company of that kind paid the taxes, where the arrangements were made by Mr. Anslinger, Commissioner of Narcotics.

Mind you, I did not know any of this at the time of the trial or I would have had Mr. Anslinger on the stand, and I would have attempted to get Mr. Babcock from New York in some way. It may not be possible to get him here, but I know I can get Mr. Anslinger here to explain what arrangements he made with Malinkrodt to send this to Squibb in New York.

If Malinkrodt manufactured them, they are from the original stamped package. That is the original package, whether it is a barrel or a ton of it. They went on to Squibb, and Squibb put them up for the Government.

Bradley said that Babcock told him these seals or flaps were placed on there by Squibb & Company and had served
300 the purpose as a revenue stamp. Bradley tells the Court that Babcock told him— it is his assumption, of course—that since they came from Malinkrodt Company, the taxes were paid. If Malinkrodt did manufacture this stuff and if Malinkrodt did send this stuff to Squibb & Company, Malinkrodt paid the tax. It has to be paid by the manufacturer if manufactured in this country. It has to be paid by the importer if it is imported in this country.

Your Honor has seen beer bottles. Your Honor has seen a little sign on the bottle, "Internal Revenue Taxes Paid." It does not have any tax stamps on it. It is just another way of denoting the fact that the tax has been paid. There is no tax stamp on it.

If Mrs. Stiles' argument is true and if there was not some other way of signifying the fact that taxes were paid other than a tax stamp, the beer bottle certainly would not have the Internal Revenue tax paid at the brewery; or whatever it says.

I think it says "paid at the brewery." That is the way they have of signifying that taxes were paid on there.

We have had no explanation of what became of these flaps. They had to be broken, or whatever happened to them here. Did the chemist break them? I asked him about the tube that the seal was on. The chemist, Mr. Spear, said that he broke that stamp on that tube himself to get to the
301 contents to make an analysis.

I did not know anything about these flaps, not until Mr. Bradley returned from New York. You can see the flap has the same identical place on each one—probably put there by a machine.

The Government has not said that they did not break these flaps to get the syrettes out. I certainly could not cross-examine him. We knew nothing about it until Mr. Bradley returned from New York. I submit the Government knew, if Mr. Anslinger arranged this whole transaction. Mr. Anslinger made arrangements for Malinkrodt in St. Louis to send these narcotics to New York. He certainly would not have made such arrangements unless they were legal narcotics, whether he bought them for the Government from Malinkrodt and then had them send to New York; but if he bought them for the Government, Malinkrodt paid taxes on them when he manufactured them, whether he sold them to this Government or to some direct concern.

It is my contention that when he manufactured them, the taxes were paid, and if they were not paid Anslinger would not have arranged for a company to send them to Squibb. Squibb would not be dealing with a bootlegger.

There is no burden on this man to send this man up to New York. It was up to the Government to prove it. I submit that the Government has not acted in good faith—not
302 Mrs. Stiles, but the agents. They had to know where it came from. It was on the box. Why didn't they inquire of Mr. Babcock?

The COURT. The reason for it is that they did not think it was necessary, I guess, because their position is that it does not make any difference.

Well, I have each of your positions clearly in mind. I have got to study it more thoroughly than just by sitting here and listening. I will take it under advisement.

Mrs. STILES. Your Honor, I have a case here that I think answers Mr. Buckley's contention.

The COURT. Cite it. Mr. Reporter, write this up for me on this question.

Mrs. STILES. *Flowers* vs. *United States*, 83 Fed. (2d) 78, and this, among other things, involved this particular section under which this man was indicted, and the Court says:

"But defendant urges somewhat faintly, and without citing any authorities, that there was no proof that the morphine delivered to Clark did not come from an original stamped package. If it was necessary to be shown in a prosecution of a peddler of narcotics, in contradistinction to a prosecution of one who had registered, then it was not shown and the case must be reversed. But we are of the opinion that in a case of an unregistered peddler such evidence is not necessary. Obviously, if it is, the numerous convictions for unlawful sales under
the statute here involved have been unlawful, and
303 no further prosecutions can ever be sustained under this
section except in the most anomalous and unusual situations. For the insistence carries with it the necessity for the proof of the element of negation, ordinarily impossible of proof."

Then the Court goes on and sets out that there are those persons who would be required under the statute to register, and in handling narcotics the wholesalers have to register and retailers have to register, and it is necessary to show that a registered wholesaler did not sell from a stamped package or that a retailer did not sell from a stamped package. But it goes on to say:

"The section nowhere seems to offer any protection."——

Mr. BUCKLEY. What section is this? That is Section 2.

Mrs. STILES. This is the section under which this man is indicted.

Mr. BUCKLEY. 2553 (a). It says, Section 2, Sales.

Mrs. STILES. This is a sale, but they are referring to the protection. He claims that there was no evidence that it was in or from a stamped package.

Mr. BUCKLEY. Your Honor, I do not want to interrupt Mrs. Stiles. The case is pertaining to sales——

The COURT. Let her read it.

Mrs. STILES. There was a sale in it, but they are referring to the same statute that we are referring to, the
304 protection to different persons:

"The section nowhere seems to afford any protection to an unregistered illicit peddler. In short, some may lawfully sell and handle in, and some from, an original stamped package, depending on their registration, but not both in and from. Those who are not registered may not legally sell at all."

Of course, we have not alleged that there is any sale here, but we are alleging that the sale is presumed by the possession.

Mr. Buckley keeps referring to the original stamped package. As I pointed out to Your Honor, the statute provides that every production of this narcotic must be stamped, so that in an ordinary narcotic the tax would be paid by the manufacturer and by the producer, and every time that is changed in form, that person who changes it must pay the tax.

Squibb & Company, in producing these syrettes, would come within those who would have to pay a tax. The only difference here is that these were not produced for commercial use. If they had been, he would have had to pay a tax on it.

Mr. BUCKLEY. Who?

Mrs. STILES. Squibb would have to pay a tax on it. The fact that no tax stamp was on these cannot be protection for this man. It is only protection for the Government, because it is specifically exempted from having to pay a tax.
305 I really cannot see where there is any confusion in the case at all.

I think it is a misinterpretation of the statute by counsel. If I understand his contention correctly, it is that once a tax is paid upon a narcotic by an importer or by the persons who manufacture it, that is the end; that anybody can have that narcotic in the future, a peddler or anyone else, if he can simply show that somewhere away back along the line a tax was paid.

If that were the spirit of the law, it would be very easy for narcotics to be stolen from the manufacturer. The tax has been paid on them; therefore anyone who handles them in any kind of illicit trade after that would be protected. That I am sure no one believes to be the spirit of the law.

Mr. BUCKLEY. Your Honor, may I say this in closing? Mrs. Stiles is referring to the Flowers case, which deals with selling, not in or from the original stamped package, which is Section 2 of the Narcotic Act—originally. Section 2 refers to selling narcotics. The Government at no time has to prove selling. That is the reason for Section 1, which includes 2551. The Government does not have to prove selling, because everyone who possesses does so at his own peril. If they are handled by reputable people or the Government has reason to believe that they are legitimate narcotics, that is the reason the
306 Government is required to prove——

The COURT. This indictment charges that this defendant sold and dispensed and distributed and purchased, which said narcotic was not in or from a stamped package.

Mr. BUCKLEY. There is no presumption of sale.

The COURT. The presumption that it happened when it is not in an original stamped package takes care of that.

Mr. BUCKLEY. We submit that it is from and it has to be from Malinkrodt, the manufacturer, to Squibb.

The COURT. I see your point.

Mr. BUCKLEY. The strip is identically the same in each box. The agents who opened up those boxes, who gave them to the chemist, had them treated or processed for fingerprints, have never once opened their mouths about the strip on the box. We don't know who opened them.

Mrs. STILES. The Government does not deny that there may have been a strip on there. That is just exactly what the investigator stated he found out from Squibb. I am granting there was, for the sake of argument; but has the investigator testified he was told that strip was in lieu of a tax stamp?

Mr. BUCKLEY. Or equivalent to. That is what he said.

Mrs. STILES. Or equivalent to. It was in lieu of a tax stamp because the Government did not have to put a tax stamp on there. I am not denying that there was a strip on
307 there.

Mr. BUCKLEY. Mrs. Stiles said everyone who handles it has to put a stamp on it. Your Honor saw the bottle which disappeared. Mrs. Stiles said it was given back to the narcotics agents. There was one stamp on it.

Mrs. STILES. He is referring to the bottle of codeine, which the Government withdrew from the case, because this vial of codeine had a tax stamp across the top.

I am not contending that everyone who handled that drug that made up the codeine drug had the stamp on that bottle, but the person who put up the codeine in that bottle paid the last tax which is on that bottle; and, of course, the tax that was paid on the product in the bottle that made up the codeine tablets—I don't know what was in it—paid the tax for whatever kind of product it was that made up the codeine tablets, and that paid for the tax stamp.

When it reached the hands of this defendant, it was in the form of codeine tablets, and the person who put those codeine tablets up in that bottle paid a tax, and that is why there was a tax stamp on it.

The COURT. I will take the case under advisement.

(Thereupon, the instant hearing was concluded.)

* * * * * * *

309 Mr. BUCKLEY. May I approach the bench, your Honor?

(Counsel for both sides approached the bench, and the following occurred:)

Mr. BUCKLEY. I assume, from conversation with Mrs. Stiles upstairs, that your Honor is going to rule adversely to my proposition?

The COURT. I am.

Mr. BUCKLEY. I spoke to Mr. Kirkland about joining in this appeal with me, which he has consented to do. He is entering his appearance in the matter.

Mr. Kirkland seems to think that part of this first count being abandoned is of great importance. He and I have looked up several cases.

The COURT. I went into that phase of it, too.

Mr. BUCKLEY. I did it in the very beginning when I raised it with the Bain case, and your Honor seemed to think that the Bain case is not applicable here.

The COURT. I had some others that I found upstairs, but I suppose you have broached the question of bail pending appeal?

Mr. BUCKLEY. I have.

The COURT. I have determined that question adversely to you, too. I do not believe that these questions of law that you have in this case are of substance. Therefore, I
310 think you ought to ask the Court of Appeals to let him out. They will look it over carefully. If they think it presents a substantial question, they won't hesitate a few seconds to turn him loose on bail. But I am not willing to do it.

Mr. BUCKLEY. After we went into this question of a substantive part of the indictment being abandoned, it seemed to be a substantial question. There are no cases in the District on it.

Mr. KIRKLAND. There are no cases in the District.

The COURT. I found a half dozen of them in a reasonably quick search which hold that that is not the same kind of thing. Bain presents a vastly different question. It may have been unfortunate language used by Mrs. Stiles when she said, "I abandon part of a count." What she meant was that the evidence would not support the proof as to codeine, but would support the proof as to the morphine.

I think, if I recall, I have found some cases on that, too. At any rate, I think that can be likened to a case of a man who stole six articles, and you proved only five. You cannot prove that he stole the sixth one. The Government does not fail in its proof there because it proved only five. The theft is still there and the possession is still there of morphine.

Mr. KIRKLAND. Would you hear us on two or three cases that we have, which I think might convince your Honor
311 that there is a substantial question of law?

The COURT. Bring them up to the bench.

Mr. BUCKLEY. If there was anything in point in this jurisdiction, I know your Honor would rely on that and we would be bound by it.

The COURT. I do not know if I have found anything that is precisely the same thing.

Mr. KIRKLAND. Your Honor recalls that the indictment charges the unlawful transfer of both morphine and codeine. It is in the conjunctive.

I am informed that at the outset of the trial the defense was quite certain that it had a perfect defense to the alleged unlawful possession of codeine.

There is one case I would like to call to your Honor's attention, *United States* vs. *Fawcett*, 115 Federal (2nd) 764. In one particular I think it is very important, because it states that:

"The test as to whether the defendant is prejudiced by an amendment"—we say it is an amendment——

The COURT. And I do not.

Mr. KIRKLAND. "To an indictment has been said to be whether a defense under an indictment as it originally stood would be equally available after the amendment is made, and whether any evidence the defendant might have would be equally applicable to the indictment."

312 The point we make, taking your analogy to the larceny, is that if the allegation was that a person had stolen five articles, you might have something to argue as to whether the proof was at fatal variance with the allegation; but here the allegation was that he was transferring unlawfully the morphine and the codeine. If it had been in the disjunctive, morphine or codeine, proof of one would have been proof of the other.

The COURT. Suppose the indictment stated that?

Mr. KIRKLAND. We would have attacked it. Here is was as though he had stolen a black and white dog. Under that, the allegation being specific, it has to be proven.

The COURT. One dog?

Mr. KIRKLAND. Had it been "white or black dog"—an all-black or an all-white dog.

The COURT. Or a black dog and a white dog. That is this case.

Mr. KIRKLAND. We say, being averred in the conjunctive, it cannot be separated, and that it would be a fatal variance.

There is one other case here, which happens to be a narcotic case. It is the case of *Guilbeau*, 288 Federal 731. This, it is true, turns on the question of variance:

"A woman had been charged in a single count with the unlawful sale of 'certain derivatives and salts of opium, to-wit, four grains of morphine sulphate' upon evidence of an
313 unlawful sale by her of four grains of morphine hydrochloride."

I could brief it by saying that the proof showed that instead of being hydrochloride, it was morphine sulphate, and the court held that to be a fatal variance.

The COURT. I think it is. To use your illustration, the defendant is charged with stealing a white dog, and then the Government wants to prove it was a black dog.

Mr. KIRKLAND. That is a fatal variance.

The COURT. That is that case.

Mr. BUCKLEY. Suppose the allegation was that the defendant stole a black horse and a white horse?

The COURT. That is all right. If they failed to prove the black horse, you were still notified that you were going to be charged with stealing a white horse. They find they have not the evidence to convict you of also stealing a black horse. You are not prejudiced, because you have been told that the Government is going to charge you with stealing both horses.

Mr. KIRKLAND. Wasn't it stated that the indictment with respect to codeine would be abandoned?

The COURT. That is where Mrs. Stiles got into trouble. He would not have thought of it if she had not used the phrase. "The Government abandones this part of the indictment."

Mrs. STILES. I won't be so honest next time.

The COURT. She did say that. It is perfectly clear
314 what she meant, and I believe she said so, as a matter of fact. She said that the codeine did have stamps on it, and therefore she was not urging that.

Gentlemen, I went into it rather hurriedly. Of course, I can be wrong, but I cannot see any substance to either one of these points.

Mr. KIRKLAND. I would like to call to the attention of your Honor the case of *United States* vs. *Demibowski*, reported in 252 Federal 894, particularly at page 899, where the court said:

"Furthermore, in view of the manner in which the various allegations in this indictment are connected and interwoven with each other, it would, in my opinion, be impossible to attempt to abandon any of the charges therein made without also amending the form in which the allegations are made; so that, even if there might be cases in which an election and nolle pros of part of a count would not necessarily involve an amendment of the indictment, yet this is certainly not such a case."

In other words, we feel that if there was an abandonment of the count in the conjunctive in an indictment with a single count, that abandonment would affect the defendant, and therefore the Court would be powerless to proceed, on lack of jurisdiction, and also the defendant would be entitled to be discharged.

315 The COURT. I did not use these cases at the time. You will have to persuade the Court of Appeals to let him stay out.

I will protect your record by denying it now, so they won't ask you why you did not let the record show that you did it.

Mr. KIRKLAND. We will object now, and give notice of appeal, your Honor.

The COURT. Yes.

(Counsel for both sides resumed their places at the trial table, and the following occurred:)

SENTENCE OF THE DEFENDANT

The COURT. Do you want to say anything?

Mr. BUCKLEY. No, sir.

The COURT. Sentence in this case will be twenty months to five years and $2,000, defendant to stand committed until payment of such fine.

The motion for bail pending appeal is denied.

For the record, I meant to say that the motion for a new trial was denied, the sentence is what I have just imposed, and the motion for bail pending appeal is denied.

(The instant hearing was concluded.)

317 [Filed in open Court June 5, 1944. Charles E. Stewart, Clerk.]

G. J. No. 29,464.
Criminal No. 73800.
Violated Harrison Narcotic Act.

District Court of the United States
for the District of Columbia

Holding a Criminal Term

April Term, A. D. 1944.

DISTRICT OF COLUMBIA, *ss:*

The Grand Jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath, do present:

That one Robert Frazier, on, to wit, the nineteenth day of April 1944, and at and within the District of Columbia, aforesaid, did then and there violate a requirement of Section 2553 (a) of the Internal Revenue Code, in that he, the said Robert Frazier, did then and there knowingly, wilfully, unlawfully, and feloniously purchase, sell, dispense, and distribute certain narcotic drugs, to wit, nineteen one-half grain synettes of morphine tartrate and twenty one-half grain codeine sulphate tablets, which said narcotic drugs were not then and there, in or from, the original stamped package containing said narcotic drugs; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

EDWARD M. CURRAN,
Attorney of the United States in and for the District of Columbia.

A true bill:

MARTIN NORMAN LEESE, *Foreman.*

321 . . . . .

Wednesday, October 16, 1946

. . . . .

Come again the parties aforesaid, in manner as aforesaid, and the same jury that was respited in this case yesterday; whereupon the said jury upon their oath say that the defendant is guilty in manner and form as charged in the indictment; whereupon said defendant is committed to the Washington Asylum and Jail, and the case is referred to the Probation Officer of the Court.

. . . . .

322 Filed Oct. 23, 1946. Charles E. Stewart, Clerk.

MOTION IN ARREST OF JUDGEMENT AND OTHER RELIEF

Comes now the defendant, by his attorney of record, M. Edward Buckley, Jr., and moves that the verdict of guilty returned against him by a jury in this Court on the 16th day of October 1946, be arrested, and further for other appropriate relief, and no judgement and sentence be imposed upon him thereon, for the following reasons:

1. That the indictment upon which the defendant was tried and convicted does not state facts sufficient to constitute an offense against the United States.

2. That this Court was incomplete and not properly constituted and therefore, lacked power and jurisdiction to try this defendant.

(a) That the petty jury in panel to try this defendant, were not selected, drawn, summoned, and impaneled in accordance with law and in violation with the District of Columbia Code for the District of Columbia and Title 28 of the United States Code.

(b) That the panel from which the 12 jurors were obtained to try the defendant, did not contain a truly representative group of a cross section of the inhabitants of the District of Columbia, economically, socially, religiously, and politically, educationally and racially.

(c) That at the time of the selection of the jury panel for this court, Government employees represented a disportion-

ately larger number of prospective jurors, than if this particular panel had been drawn and selected in compliance with the law in selecting jurors for the various panels of the Courts.

3. That the Court is without jurisdiction of the offense in that the offense hereto was not committed in the Dis-

323 trict of Columbia.

4. For other and additional reasons, apparent from the record and the case made, which will be called to the Court's attention on the hearing hereof.

* * * * * *

324 Filed Oct. 23, 1946. Charles E. Stewart, Clerk.

MOTION FOR NEW TRIAL AND OTHER APPROPRIATE RELIEF

Comes now the defendant, by his attorney of record, M. Edward Buckley, Jr., and moves the Court to grant him a new trial for the following reasons:

1. That the Court erred in denying defendant's motion for acquittal, which was made at the conclusion of the evidence.

2. That the verdict is contrary to the weight of the evidence.

3. That the verdict is not supported by substantial evidence.

4. That the Court erred in refusing to instruct the jury as requested by the defendant's prayers.

5. That the defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances.

That the attorney for the Government stated in her opening argument to the jury, that the prosecution was going to abandon a certain protion of the one count and only count of the indictment.

6. For other and additional reasons, apparent from the record and the case made, which will be called to the Court's attention on the hearing hereof.

* * * * * *

326 Thursday, November 21, 1946

* * * * * *

Come as well the Attorney of the United States, as the defendant in proper person, in custody of the Superintendent of the Washington Asylum and Jail, and by attorney, M. Edward Buckley, Esquire; and thereupon it is

demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him, and he says nothing except as he has already said; whereupon it is considered by the Court that, for his said offense, the said defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Twenty (20) months to Five (5) years and to pay a fine of Two Thousand Dollars ($2000.00).

* * * * *

333 DEFENDANT'S PRAYER NO. 1

The Court instructs the jury that every man charged with a criminal offense under the law is presumed to be innocent until proven guilty beyond a reasonable doubt by the evidence given upon the witness stand at the trial; and that this presumption of innocence applies to every stage of the case, in which the defendant when he is arraigned, remains with him through the trial, goes with the jury in the jury-room and remains there until the jury are satisfied beyond a reasonable doubt that the defendant is guilty as charged in the indictment. The burden of overcoming this presumption of innocence and of proving the defendant guilty as charged, beyond a reasonable doubt, is upon the Government, and if the Jury have a reasonable doubt as to defendant's guilt on the whole case, or as to any material or essential fact or circumstance to prove the charge as laid in the Indictment, it is the duty of the jury to give the defendant the benefit of such doubt and find a verdict of not guilty.

Gr. in substance.

(Signed) H. A. S.

* * * * *

334 DEFENDANT'S PRAYER NO. 2

The Court instructs the jury that in the case on trial, in which the defendant is charged with purchasing morphine tartrate, within the District of Columbia in violation of Section 2553 a of Title 26, United States Code, that where the narcotics mentioned are in the original stamped package at the time the narcotics are discovered by the officers, then the legislative presumption of purchase other than from the original stamped

package created by this particular section, namely, 2553 a, does not arise.

Denied.

(Signed) H. A. S.

* * * * *

335 DEFENDANTS PRAYER No. 3

The Court instructs the jury that in prosecution for violation of Section 2553 (a) of Title 26, United States Code, the legislative presumption of prima facie evidence of purchase, arises only, when the narcotic drugs are found to be in the possession of the defendant and the narcotic drugs are not in the original stamped package or from the original stamped package.

Denied.

(Signed) H. A. S.

* * * * *

336 DEFENDANT'S PRAYER No. 4

The Court instructs the jury that possession of a narcotic drug is not and can not lawfully be made prima facie evidence of a violation of the Harrison Narcotic Act, but making the possession of a narcotic drug, which does not bear the required stamps prima facie evidence of its purchase other than from the original stamped package, in violation of statute, violates no constitutional rights of the person on trial.

Annotation 51–A. L. R. 1170, 86–A. L. R. 186.

Denied.

(Signed) H. A. S.

* * * * *

337 DEFENDANT'S PRAYER No. 5

The Court instructs the jury that an illegal sale of a drug need not be made with knowledge that the act inhibited, in order to constitute an offense, but "scienter" is a neecessary element of the offense of purchasing narcotic drugs except from or in the original stamped package.

Purchase—Annotation 39–A. L. R. 249.

Nigro vs. *United States*, C. C. A. Mo. 4 Fed. 2nd—781.

Denied.

(Signed) H. A. S.

338 DEFENDANT'S PRAYER NO. 6

The Court instructs the jury that when Narcotic drugs are found to be in the possession of a person, who is on trial, but the evidence discloses that the drugs when found are in or from the original stamped package, then no inference will be permitted that the possession was unlawful.

Wong Lung Sing vs. *United States*, C. C. A. Cal. 3 Fed. 2nd—780.

Denied.

(Signed) H. A. S.

339 DEFENDANT'S PRAYER NO. 7

The Court instructs the jury that before the defendant can be found guilty upon this indictment, the burden of proof is upon the Government to prove to the satisfaction of the jury, beyond a reasonable doubt, that the defendant "*purchased*" the narcotic drugs mentioned in the indictment, within the jurisdiction of this court, namely, within the District of Columbia.

Conaldson vs. *United States*, C. C. A. Utah. 23 Fed. 2nd—178.

Brightman vs. *United States*, C. C. A. Okla. 7 Fed. 2nd—532.

Denied.

(Signed) H. A. S.

340 DEFENDANT'S PRAYER NO. 8

The Court instructs the jury that if from the evidence produced by the prosecution, the government has failed to prove to the satisfaction of the jury, beyond a reasonable doubt, that the defendant "*purchased*" the narcotic drugs "*within the District of Columbia*," then it would be the duty of the jury to find the defendant "*not guilty*", because the

burden of proving "*venue*" of the crime, is upon the Government.

Brightman vs. *U. S.*, C. C. A. Okla. 7 Fed. 2nd—532.

Sixth Amendment to the Constitution of the United States.

Denied.

(Signed). H. A. S.

341 DEFENDANT'S PRAYER NO. 9

The Court instructs the jury that a narcotic drug, to be considered, as being in or from the original stamped package, does not require that an actual stamp must appear on the package containing the drug, and if the importer, manufacturer, producer or compounder complies with any other method which may be prescribed by the Secretary of the Treasury to signify the payment of taxes by the importer, manufacturer, producer, or compounder of narcotics, any such tax may, under regulations prescribed by the Secretary, be collected by stamp, coupon, serial numbered ticket, or such other reasonable device or method as may be necessary or helpful in securing a complete and prompt collection of the tax.

Authority for Prayer No. 9

Title 26. United States Code.

Section 2550 (a) Tax.

Section 2550 (a) by whom Tax is paid.

Section 2550 (c). How tax is Paid.

1. Stamps.—The tax imposed by subsection (a) shall be represented by appropriate stamps, to be provided by the Secretary.

342 3. Other Methods.—Whether or not the method of collecting any tax imposed by this section or by section 3220 of Title 26, U. S. Code, is specifically provided therein, any such tax may, by the Secretary, be collected by stamp, coupon, serial numbered ticket or such other reasonable device or method as may be necessary or helpful in securing a complete and prompt collection of the tax.

Denied.

(Signed) H. A. S.

343 DEFENDANT'S PRAYER NO. 10

The Court instructs the jury that only persons "*selling*" narcotics in or from the original stamped package are liable for the payment of tax.

Gerardi vs. *United States*, C. C. A. Mass. 24 Fed. 2nd—189.

Denied.

(Signed) H. A. S.

* * * * *

344 DEFENDANT'S PRAYER NO. 11

The Court instructs the jury that possession of narcotics creates no presumption of violation under Section 3220 Title 26, United States Code, where necessity for the defendant to have registered is not shown by the government.

Gerardi vs. *United States*, C. C. A. Mass. 24 Fed. 2nd—189.

Denied.

(Signed) H. A. S.

* * * * *

345 DEFENDANT'S PRAYER NO. 12

The Court instructs the jury that where the facts are as consistent with innocence as they are with the guilt of the defendant, their verdict should be that of not guilty.

Romano vs. *U. S.*, C. C. A. N. Y. 9 Fed. 2nd—522.

Gr. in substance.

(Signed) H. A. S.

* * * * *

346. DEFENDANT'S PRAYER NO. 13

The Court instructs the jury that each and every element of the offense must not only be charged in the indictment but each and every element of the offense must be proven by the government.

Hale vs. *U. S.*, C. C. A. W. Va. 89 Fed. 2nd—578.

Gr. in substance.

(Signed) H. A. S.

* * * * *

District Court of the United States for the District of Columbia

United States of America, District of Columbia, *ss:*

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered 317 to 332, both inclusive, to be a true and correct transcript of the record according to designation of record by counsel filed and made a part of this transcript, in cause entitled United States of America vs. Robert Frazier, Criminal No. 73806, as the same remains upon the files and of record in said Court, except the following:

The original certified record of official reporter, pages numbered 1 to 316, both inclusive, is included herein.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 15th day of April, 1947.

[SEAL] CHARLES E. STEWART, Clerk,
By JOHN J. DONOVAN,
Deputy Clerk.

[Endorsement on cover:] No. 9421. *Frazier* v. *United States.* United States Court of Appeals for the District of Columbia. Filed Apr. 15, 1947. Joseph W. Stewart, Clerk.

U. S. GOVERNMENT PRINTING OFFICE 1947

99 In United States Court of Appeals,

District of Columbia

[File endorsement omitted.]

No. 9421

ROBERT FRAZIER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal From the District Court of the United States for the District of Columbia

Argued June 9, 1947—Decided October 6, 1947

Mr. M. Edward Buckley, Jr., with whom Mr. Ira Chase Koehne was on the brief, for appellant.

Mr. John D. Lane, Assistant United States Attorney, with whom Mr. George Morris Fay, United States Attorney, and Mrs. Grace B. Stiles, Assistant United States Attorney, were on the brief, for appellee.

Mr. Sidney S. Sachs, Assistant United States Attorney, also entered an appearance for appellee.

Before EDGERTON, CLARK, and PRETTYMAN, JJ.

Opinion

Filed Oct. 6, 1947

PER CURIAM: Appellant was convicted under an indictment which charged that he did "knowingly, wilfully, unlawfully, and feloniously purchase, sell, dispense, and distribute certain narcotic drugs, to wit, nineteen one-half grain synettes [sic] of morphine tartrate and twenty one-half grain codeine sulphate tablets, which said narcotic drugs were not then and there, in or from, the original stamped package." The Internal Revenue Code, U. S. C. Title 26, § 2553, made it "unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned * * * except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for [1] any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found * * *"

[1] Changed to "from" by Act of July 1, 1944, 58 Stat. 721, U. S. C. Supp. V, Title 26, § 2553. The date of appellant's alleged offense was April 19, 1944.

The government did not contend at the trial that appellant sold, dispensed, or distributed any drugs. It contended that he
100 purchased, in the District of Columbia, the morphine tartrate described in the indictment.

Appellant was arrested in the District. He then had in his possession a number of one-half grain syrettes of morphine tartrate. They were not in or from any stamped package. They had been lawfully manufactured for tax-free distribution in the army and were in boxes labelled: "Produced by E. R. Squibb & Sons for U. S. Army Medical Department. Morphine used was property of U. S. Government * * * Control 3D41007." Appellant testified that the boxes were handed to him in Maryland by a soldier whom he did not know, and who asked him to keep them until the soldier came to town. Appellant knew that the boxes contained narcotics, and tried to get rid of them when he was arrested.

Appellant contends there was no evidence that he purchased the drugs, or that he acquired them in the District. There was no direct testimony on either point but none was necessary. The statutory "prima facie evidence" clause, quoted above, covers both the fact of purchase and the place of purchase. "The statute here talks of prima facie evidence but it means only that the burden shall be upon the party found in possession to explain and justify it when accused of the crime that the statute creates." Casey v. United States, 276 U. S. 413, 418. The jury were under no obligation to believe appellant's own interested and improbable testimony,[2] and there was no other testimony that tended substantially to explain and justify his possession of the drug.

Since "stamped package" plainly means a package which has "appropriate tax-paid stamps," it is no defence that the morphine tartrate in appellant's possession had been lawfully manufactured and delivered to the army without stamps and was labelled accordingly. It has been suggested that because the drug had never been in a stamped package, it was not covered by the statutory words "drugs * * * except in the original stamped package or from the original stamped package." This suggestion involves reading into the statute, after the words just quoted, the words "which formerly contained the drugs." It would follow that any narcotics which had, either lawfully or unlawfully, escaped taxation and stamping might be purchased and sold with impunity. The statute has of course no such purpose or effect. "The" stamped package to which it refers is the stamped package in which narcotics must be placed before they can lawfully be sold to the public or purchased by the public.

[2] Killian v. United States, 58 App. D. C. 255, 29 F. 2d 455; Goode v. United States, 59 U. S. App. D. C. 67, 140 F. 2d 377; Wong Lung Sing v. United States, 3 F. 2d 780 (C. C. A. 9th); Acuna v. United States, 74 F. 2d 359 (C. C. A. 5th).

The prosecutor told the jury that the government was "abandoning" the part of the indictment relating to codeine. But, as he made clear, he meant only that he would not attempt to prove that part. He had only to prove some facts which were charged and were criminal, not all the facts charged in the indictment. His abandonment of the codeine charge is as immaterial as the fact that he made no attempt to prove that appellant did "sell, dispense, and distribute" anything.

Appellant objects to the jury, on the grounds that (1) persons who did not wish to serve had been excused from the panel;
101 (2) all the jurors were government employees; (3) one juror was a messenger in the Office of the Secretary of the Treasury; and (4) one was the husband of a Treasury employee. Willingness to serve does not disqualify a juror. Neither does government employment. United States v. Wood, 299 U. S. 123. In Higgins v. United States, U. S. App. D. C. , 160 F. 2d 222, a narcotics case, we affirmed a conviction by a jury nine members of which were government employees. No juror in the present case was asked whether he was employed in the Treasury Department, and the fact that one was so employed was not discovered until after the trial. He, like the others, had answered satisfactorily many questions intended to guard against bias. He had no connection with the Department's Bureau of Narcotics, "the particular branch of the Government charged with the administration of the narcotic laws." Appellant's preemptory challenges had not been exhausted when it developed that a prospective juror was married to a Treasury employee. Appellant never specifically challenged this juror, but merely included him in a general challenge of the entire jury. We find no error or abuse of discretion and no evidence that any member of the jury was unqualified or biased.

Appellant's other contentions are likewise without merit.

Affirmed.

102 In United States Court of Appeals for the District of Columbia

No. 9421—October Term, 1947

ROBERT FRAZIER, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

[File endorsement omitted.]

Appeal From the District Court of the United States for the District of Columbia

Before: EDGERTON, CLARK, and PRETTYMAN, JJ.

Judgment

Filed Oct. 6, 1947

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court ap-

Appeal From the District Court of the United States for the

PER CURIAM.

Dated October 6, 1947.

103 In United States Court of Appeals for the District of Columbia

[File endorsement omitted.]

Designation of record

Filed Dec. 5, 1947

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint appendix to appellee's brief.
2. Opinion.
3. Judgment.
4. This designation.
5. Clerk's certificate.

M. Edward Buckley, Jr.,
M. EDWARD BUCKLEY, JR.,
Attorney for Appellant.

PROOF OF SERVICE

I hereby acknowledge service of a copy of the above Designation of Record this 5th day of December 1947.

SIDNEY S. SACHS,
Assistant United States Attorney.

104 (Clerk's certificate to foregoing transcript omitted in printing.)

105 Supreme Court of the United States

Order extending time to file petition for writ of certiorari

Upon consideration of the application of counsel for petitioner,
It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 5, 1947.

ROBERT H. JACKSON,
Associate Justice of the Supreme Court of the United States.

Dated this 5th day of November 1947.

106 Supreme Court of the United States

No. 213, Misc. —, October Term, 1947

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

Order granting motion to proceed in forma pauperis; granting petition for writ of certiorari, etc.

April 19, 1948

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted and the case is transferred to the appellate docket as No. 750.

U. S. GOVERNMENT PRINTING OFFICE 1948

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

44

No. 44

ROBERT FRAZIER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR ROBERT FRAZIER, PETITIONER

MILTON CONN,
M. EDWARD BUCKLEY, JR.,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 44

ROBERT FRAZIER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR ROBERT FRAZIER

Opinion Below

The opinion in the United States Court of Appeals for the District of Columbia (R. 99-101), is reported at 163 F. (2d). 817.

Jurisdiction

The judgment of the Court of Appeals was entered on October 6, 1947. (R. 102). The petition for a writ of certiorari and petition to proceed *in forma pauperis* were filed

on December 5, 1947 and were granted April 19, 1948 (R. 103). The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

Questions Presented

1. Whether petitioner was denied a trial by an impartial jury because the jury consisted of twelve employees of the United States Government, among whom one juror was employed in the Office of the Secretary of the United States Treasury Department and another juror's wife was employed in the Office of the Secretary of the United States Treasury Department, the Secretary of the Treasury being the person charged with the administration and enforcement of the narcotic laws, as well as the Internal Revenue laws of the United States.

2. The jury before whom the petitioner was tried did not represent a proper cross section of the community, the prospective members of which were unlawfully permitted to arbitrarily and capriciously determine whether or not they would serve as jurors.

Statutes Involved

Harrison Narcotic Act, Section 2553a, Title 26, U. S. Code (Internal Revenue Code) (R. 90). See Appendix D. See also Appendix A, B, C, E and F.

Statement

Petitioner was indicted on June 5, 1944 (R. 90), tried on October 9, 1946 (R. 1), and convicted on October 10, 1946 (R. 71-72), in the United States District Court for the District of Columbia.

The indictment contained one count, charging petitioner with purchasing narcotic drugs within the District of Columbia, said narcotic drugs at the time of purchase were not

in or from the original stamped package, contrary to Section 2553a, Title 26, U. S. Code (Internal Revenue Code) (R. 90). (Appendix D.)

Petitioner was sentenced to serve a term of twenty (20) months to five (5) years and to pay a fine of $2,000.00 (R. 89).

The jury which convicted the petitioner consisted of twelve (12) Federal Government employees after petitioner had exercised all his peremptory challenges. One of the twelve (12) government employed jurors was employed in the Office of the Secretary of the United States Treasury Department, although when asked by counsel for petitioner "Are any members of your immediate family employed in the Treasury Department?" juror, Alexander Moore, remained silent (R. 5), while juror, Benjamin Root, answered "My wife is in the Treasury Department". When asked what branch of the Treasury Department, his wife was employed, juror Root replied "The Secretary's Office" (R. 5). The Secretary of the Treasury is the person who Congress holds responsible for the administration and enforcement of the narcotic laws, as well as the Internal Revenue laws of the United States.

The petitioner having exercised his ten (10) peremptory challenges, the jury still consisted of twelve (12) Federal Government employees (R. 12-13), one of these twelve (12) government employed jurors being employed in the Office of the Secretary of the Treasury (R. 101), and one juror's wife being employed in the Office of the Secretary of the Treasury (R. 5).

These government employed jurors were challenged for cause (R. 12-13), as well as the other ten government employed jurors. Petitioner's motion and request were denied by the trial court (R. 13), and the twelve government employed persons were duly sworn as jurors in this case (R. 13).

Petitioner, relying upon the opinion of this Court, in the case of *United States* v. *Wood*, 299 U. S. 123, 149, is of the opinion that petitioner has been deprived of due process of law, in that petitioner did not receive a trial by a fair and impartial jury.

Petitioner challenged the entire panel before the trial on the grounds that the panel did not represent a proper cross section of the community. This motion of the petitioner was also denied (R. 12-13).

The method which was in effect at the time that this panel of jurors was selected for jury duty, was as follows: 500 prospective jurors were summoned to appear in Court for jury service on the 1st Tuesday of each month. Of this group of 500 persons, the clerk would ask how many did not desire to serve on jury duty, to raise their hands; if 250 raised their hands, they would be excused by the Clerk without giving any reason for not wanting to serve on jury duty. This method enables wage earners and businessmen to get out of serving on juries without stating any reason. This leaves the majority of the panels consisting mostly of government employees and housewives, which does not represent a proper cross section of the community. (*Thiel* v. *Southern Pacific Co.*, 321 U. S. 217. *Fay* v. *The People of the State of New York*, 332 U. S. 261.)

Petitioner contends that by this method of selection of jurors, he was denied due process of law and equal protection of the laws, in violation of the Fourteenth Amendment to the Federal Constitution.

Statement of Points

1. The trial court was improperly constituted and without power to subject petitioner to the pains and penalties of trial and sentence because the jury was not an impartial jury and the verdict and sentence herein are each illegal and void.

2. The verdict and sentence are each contrary to law. The verdict being rendered by a jury which did not represent a cross section of the community, and whose prospective members were unlawfully permitted to arbitrarily and capriciously determine whether or not they would serve as jurors, which determination usurped judicial power.

Summary of Argument

1. The trial court at the time of petitioner's trial was improperly constituted and therefore was then and there without power to subject petitioner to the pains and penalties of trial and liability of sentence herein, because the petitioner's trial jury below was not an impartial jury, in violation of the rights of petitioner guaranteed by the due process clause of the Fifth Amendment, and the impartial jury guarantee of the Sixth Amendment, which renders the verdict and sentence herein each unlawful and void because the same is against express provisions of the Constitution, which bounds and limits all jurisdiction.

2. The verdict and sentence herein are each contrary to the law because the same violate the provisions of law stated, and others, in points, and summaries of argument.

Argument

Point One

1. The Sixth Amendment to the Constitution requires that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury."

In *United States* v. *Wood*, 299 U. S. 123, 81 Law Ed. 78, 57 S. C. 177, it was held that:

> "In dealing with an employee of the Government, the Court would properly be solicitous to discover whether in view of the nature or circumstances of his

employment, or of the relation of the particular governmental activity to the matter involved in the prosecution or otherwise, he had actual bias, and, if he had, to disqualify him."

In the case of *United States* v. *Wood, supra,* the accused was on trial for theft from a store of a private corporation, whereas petitioner was on trial for violation of the Internal Revenue Statutes of the United States, namely, violation of the Harrison Narcotic Act, which statute the Supreme Court of the United States declared to be constitutional as a revenue measure and not as an attempt to interfere with the police power reserved to the States (*U. S.* v. *Doremus,* 249 U. S. 86).

Can it be seriously and considerately urged that petitioner was tried by an "impartial jury" when it is taken into consideration that petitioner, having exhausted his ten peremptory challenges, and having his challenge for cause denied as to all of the twelve government employed jurors, including jurors Alexander Moore and Benjamin Root, the former and the wife of the latter each being employed in the Office of the Secretary of the United States Treasury Department, which is the particular branch of the United States Government and the particular individual of the Government to whom Congress has placed the responsibility of administering and enforcing the narcotic laws, as well as the collection of such revenues. Because petitioner was being tried for a crime of violating the Harrison Narcotic Act, which is a violation of the Internal Revenue Code (Section 2553a, Title 26, U. S. Code), and the witnesses against petitioner included Federal Narcotic Agents, who are employees of the United States Treasury Department, a chemist, who is also an employee of the United States Treasury Department, and a fingerprint expert, an employee of the Federal Bureau of Investigation of the United States Department of Justice, it would be deemed ridiculous, if not

silly, for anyone to contend that petitioner was thus deprived of his liberty *by due process of law*, in a trial by a fair and "impartial" jury, such as he is guaranteed by the Fifth and Sixth Amendments of the Constitution.

In the case of *United States* v. *Wood*, *supra*, this Court said, at pages 145-146:

> "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula. State courts enforcing similar requirements of state constitutions as to trial by jury have held that legislatures enjoy a reasonable freedom in establishing qualifications for jury service, although these involve a departure from common law rules. This principle was thus stated by the Court of Appeals of New York in *Stokes* v. *People*, 53 N. Y. 164, 173: 'While the Constitution secures the right of trial by an impartial jury, the mode of procuring and impaneling such jury is regulated by law, either common or statutory, principally the latter, and it is within the power of the legislature to make from time to time such changes in the law as it may deem expedient, taking care to preserve the right of trial by an impartial jury'. And in *Brown* v. *State*, 62 N. J. L. 666, 678; 42 Atl. 811, the Court of Errors and Appeals of New Jersey enunciated the same doctrine: 'The provision in our constitution (paragraph 8) that the accused should have a right to a speedy and public trial by an impartial jury, secured to the accused a right to a trial by an impartial jury by an express constitutional provision. The means by which an impartial jury should be obtained are not defined. In neither of the constitutional provisions on this subject is there any requirement with respect to challenges, or to the qualifications of jurors, or the mode in which the jury shall be selected. These subjects were left in the discretion of the legislature, with no restriction or limita-

tions, except that the accused should have the right to be tried by an impartial jury'."

Petitioner here finds himself in a much different position than the defendant in the case of *United States* v. *Wood*, *supra*. Petitioner here is charged, not with the larceny from some private corporation, which any juror, whether employed by the government, or not, could sit and hear the evidence, and render a fair and impartial verdict, but petitioner herein was charged with the particular crime which, doubtless would be of special interest to employees in certain governmental departments of the United States.

It will be observed that the employment of both jurors Moore and the wife of Root were in the very department to the affairs of which the alleged offense related. *Higgins* v. *United States*, 160 F. 2d 222 (App. D. C.), certiorari denied, 331 U. S. 822.

As set forth in the opinion of the Supreme Court of the *Wood* Case, *supra*,

> "And what appears to be so obviously true in this case of larceny from a private corporation, would be true also in criminal prosecutions in general, running the gamut of offenses from murder, burglary and robbery to cheats and disturbances of the peace.
>
> "We think that the imputation of bias simply by virtue of Governmental employment, without regard to any actual partiality, growing out of the nature and circumstances of particular cases, rests on an assumption without any rational foundation.
>
> "It is said that particular crimes might be of special interest to employees in certain Government Departments, as, for example, the crime of counterfeiting, to employees of the Treasury. But when we consider the range of offenses and the general run of criminal prosecutions, it is apparent that such cases of special interest would be exceptional.
>
> "The law permits full inquiry as to actual bias in any such instances. We repeat, that we are not dealing with

> actual bias, and, until the contrary appears, we must assume that the Courts of the District, with power fully adequate to the occasion, will be most careful in those special instances, where circumstances suggest that any actual partiality may exist, to safe-guard the just interests of the accused."

This, the trial court failed to do by denying petitioner's motion to challenge the jury for cause (R. 12-13), and thereby occasioned the deprivation of petitioner's liberty without due process of law, Fifth Amendment of the Constitution of the United States.

In *Glasser* v. *United States*, 315 U. S. 60, 71, it is held that:

> "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused."

While the juror must decide for himself whether his opinion is such as to prevent an unbiased verdict, yet he is not the judge of his own competence, of his own impartiality, and of his own freedom from prejudice. No statute can clothe him with such judicial discretion and power. The competency of the juror is left to the discretion of the court. *Com.* v. *Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; *Scribner* v. *State*, 3 Okla. Crim. 601, 108 Pac. 422, 35 L. R. A. (N. S.) 985; *Com.* v. *Minney*, 216 Pa. St. 149, 65 Atl. 31, 116 A. S. R. 763 and note.

To this end the judge may have recourse to any means of information within his power. In fact he should carefully investigate every source which would be calculated to throw any light upon the competency of a juror, and if the judge is not entirely satisfied of the competency of the juror, he should be excused. *State* v. *Aaron*, 4 N. J. L. 231, 7 Am. Dec. 592; *Scribner* v. *State*, 3 Okla. Crim. 601, 108 Pac. 422, 35 L. R. A. (N. S.) 985 and note.

If the challenge for cause is overruled, and if the juror answers the statutory questions so as to qualify himself, he stands before the court as a competent juror, and he can not be called on to disqualify himself. If placed on the court as a trier and his qualifications are brought to the attention of the court by evidence other than that of the juror, then the court should determine the question as to whether he is a competent juror or not, and ask him such questions only as he under the law would be compelled to answer if called as an ordinary witness, and then determine his competency, according to the circumstances of the case, from the extrinsic evidence, as well as the statement of the juror. *Ryder* v. *State*, 100 Ga. 528, 28 S. E. 246, 62 A. S. R. 334, 38 L. R. A. 721.

The rule of the common law on this subject is thus stated by Blackstone:

> "Jurors may be challenged propter affectum, for suspicio of bias or partiality. This may be either a principal challenge, or to the favor. A principal challenge is such, where the cause assigned carries with it prima facie evident marks of suspicion either of malice or favor: as, that a juror is a kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; . . . that he is the party's master, servant, counselor, steward, or attorney . . . all these are principal causes of challenge; which, if true, can not be overruled, for jurors must be omni exceptione majores." 3B1 Com. 363. See also Thompson & M. Juries, P. 176.

By overwhelming weight of authority this rule is recognized in this country; and there is no provision of our Constitution changing it or impairing its vigor.

In the case of *Crawford* v. *United States*, 212 U. S. 183, 196, this Court said:

> "Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to

always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence. The law therefore most wisely says that with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given.

"The position of the juror in this case is a good instance of the wisdom of the rule. His position was that of an employe, who received a salary from the United States, and his employment was valuable to him, not so much for the salary as for the prospect such employment held out for an increase in his business from the people who might at first come to his store for the purchase of stamps, etc. It need not be assumed that any cessation of that employment would actually follow a verdict against the Government. It is enough that it might possibly be the case, and the juror ought not to be permitted to occupy a position of that nature to the possible injury of a defendant on trial, even though he should swear he would not be influenced by his relations to one of the parties to the suit in giving a verdict. It was in error to overrule the defendant's challenge to the juror."

A few cases only need be cited in which it has been held that it is error to permit a clerk or employee of a private party or a corporation to sit as a juror over the objection of the opposite party; *Central R. Co.* v. *Mitchell*, 63 Ga. 173, 179; *Hubbard* v. *Rutledge*, 57 Miss. 7, 12; *Louisville, N. W. & T. R. Co.* v. *Mask*, 64 Miss. 738, 744, 2 Sol. 360; *Burnett* v. *Burlington & M. R. Co.*, 16 Neb. 332, 334, 20 N. W. 280; *Omaha & R. Valley R. Co.* v. *Cook*, 37 Neb. 435, 55 N. W. 943; *Houston & R. C. R. Co.* v. *Smith* (Tex. Civ. App.) 51 S. W. 506; *Michigan Air Lines R. Co.* v. *Barnes*, 40 Mich. 383, 385.

In *Louisville, N. O. & T. R. Co.* v. *Mask, supra,* the Court said:

> "It does not matter that he had the self-confidence to swear that he could try the cause impartially. It was not for him to determine his competency on that point. When the fact was developed that he was in the employment of appellant the law adjudged him incompetent. The law does not lead jurors into the temptations of a position where they may secure advantage to themselves by doing wrong, nor permit the possibility of the wavering balance being shaken by self-interest."

These were all civil cases. For stronger reasons the doctrine applies in criminal prosecution.

Within a few lines, the Federal Constitution provides: "No person shall . . . be deprived of life, liberty or property, without due process of law; . . . (5th Amdt.) (and that) . . . In all criminal prosecutions, the accused shall enjoy the right to . . . trial by an impartial jury of the . . . United States wherein the crime shall have been committed . . . (6th Amdt.)."

In the case of *Washington* v. *Seattle,* 170 Wash. 371, 16 Pac. 2d 597, the Court held that in an action against a city for personal injuries, a woman, whose husband was in the employ of the city, and for that reason was himself subject to challenge for implied bias, was also disqualified; the Court said that inasmuch as the wife had a direct and immediate interest in the compensation received by her husband, as a result of his employment, was presumptively community property, the reasoning that would imply bias on his part would affect his wife to the same extent.

The law, therefore, most wisely says, that with regard to some of the relations which may exist between these Government employed jurors and one of the parties, bias may be implied, and evidence of its actual existence need not be

adduced. Therefore, petitioner most respectfully contends that the employment relationship existing between these Government employed jurors and the governmental department in which they are employed necessarily implies bias and that petitioner's motion and request that they be challenged for cause should not have been denied by the trial court (R. 12-13).

The Government contends in its memorandum in opposition to the granting of the petition for a writ of certiorari that "Although petitioner had full opportunity to examine the prospective jurors and exercise this right, he did not see fit to inquire whether any of them was an employee of the Treasury Department, but asked only whether any members of their immediate family were employed in that department". Petitioner not only meant, but felt that the above interrogation would certainly be applicable to each individual prospective juror, who at that time was seated in the jury box and certainly each of the twelve prospective jurors who was asked this question is a member of his or her own immediate family.

In *Crawford* v. *United States, supra,* this Court said at pages 193-194:

> "Even though the juror was not a salaried officer of the Government, under *United States* v. *Smith*, 124 U. S. 525, which was founded upon a statute concerning a very different subject, and as to which different reasons might apply, and even though such an officer was only exempt under section 217, and not disqualified under section 215, yet we are of opinion that the objection actually made reaches beyond the mere question whether technically the juror was or was not a salaried officer of the Government, and that it reaches the question of the qualification of a juror by reason of his relations to the Government as a Post Office clerk or employee, in a sub-postal station, and whether such relations did not by law disqualify him from acting as a

juror in an action to which the Government was a party. The objection to the juror was evidently by reason of his relations to the Government, however described.

"In criminal cases courts are not inclined to be as exacting, with reference to the specific character of the objection made, as in civil cases. They will, in the exercise of sound discretion, sometimes notice error in the trial of a criminal case, although the question was not properly raised at the trial by objection and exception. *Wiborg* v. *United States*, 163 U. S. 632, 659.

"Under this rule the general character of the objection to the juror was fairly before the court, and therefore we think it proper to notice the alleged error in the reception of this juror and to decide it with respect to the general qualification of the juror under the law, without being tied down to the question of whether he was a salaried officer and so exempt, but not, as is contended, thereby disqualified to serve as a juror."

Point Two

The jurors depriving petitioner of his liberty herein were initially selected by the trial court asking the men and women members of the panel to hold up their hands if they did not desire to serve (R. 12-13).

Thus selected jury did not comprise a due, impartial and fairly representative cross section "Of the . . . District wherein the crime shall have been committed." (6th Amdt.) because by such a request the trial court unlawfully abdicated its exercise of Judicial Power (Federal Constitution, Article III, Sec. 2) of judicially determining who had, and who had not, good and lawful cause for being judicially relieved, as to this cause, of the performance of their public duty of acting as jurors; and thereby the trial court unlawfully gave each person summoned for jury duty the privilege of deciding for themselves arbitrarily and capriciously whether he or she would perform such public duty.

Among the many potent reasons why the jury which deprived petitioner of his liberty was not an impartial and

fairly representative "cross-section of the . . . district wherein the crime shall have been committed." (6th Amdt.) the result of its undue and unlawful selection are typically that the jury did not comprise any of those:

(a) of the non-legal profession; and

(b) having business, or being executives, or persons of means, or bankers, or brokers, etc.

(c) earners of over $4.00 per day (the pay of jurors) of whom there are legion in these times of high wages and prices; which by the undue and unlawful process of selection employment herein, leaves in said district only those amiable ones willing to perform such public duty, who are either Government employees who draw their regular salaries while acting as jurors, or housewives for diversion at the modest jury fee of $4.00 per day.

9. The foregoing, being the unlawful reason why the trial jury below was composed solely of government employees, one of whom, Alexander Moore, was employed in the Office of the United States Secretary of the Treasury (R. 101) and juror Benjamin Root's wife was also an employee in the Office of the United States Secretary of the Treasury (R. 5), who is by law charged with the duty of administering and enforcing the narcotic laws, as well as the revenue laws of the United States, both of which violations were charged in the indictment herein. Said employment is admitted by the government in its answer to an application for bail pending appeal. See Sections 2550, 2552a, 2552b, 2553a, 2559a and 2560, of Title 26, U. S. Code. See Appendix A, B, C, D, E and F, hereto attached and made a part hereof.

Conclusion

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be reversed and the case be remanded to the District Court.

Milton Cohn,
M. Edward Buckley, Jr.,
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406 5th Street, N. W.,
Washington, D. C.

APPENDIX A

UNITED STATES CODE, TITLE 26

Internal Revenue Code, provides as follows:

Section 2550. Tax:

(a) Rate. There shall be levied, assessed, collected, and paid upon opium, coca leaves, any compound, salt, derivative, or preparation thereof, produced in or imported into the United States, and sold, or removed for consumption or sale, an internal revenue tax at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce. The tax imposed by this subsection shall be in addition to any import duty imposed on the aforesaid drugs.

(b) By whom paid. The tax imposed by subsection (a) shall be paid by the importer, manufacturer, producer, or compounder.

(c) How paid:

(1) Stamps. The tax imposed by subsection (a) shall be represented by appropriate stamps, to be provided by the Secretary.

(2) Assessment. For assessment in case of omitted taxes payable by stamp, see section 3311 and section 3640.

(3) Other methods. Whether or not the method of collecting any tax imposed by this section or by section 3220 is specifically provided therein, any such tax may, under regulations prescribed by the Secretary, be collected by stamp, coupon, serial-numbered ticket, or such other reasonable device or method as may be necessary or helpful in securing a complete and prompt collection of the tax. All administrative and penalty provisions of subchapters A, B and C of chapter 11, in so far as applicable, shall apply to the collection of any tax which the Secretary determines or prescribes shall be collected in such manner.

APPENDIX B

UNITED STATES CODE, TITLE 26

Internal Revenue Code, provides as follows:

Section 2552. Stamps:

(a) Affixing. The stamps provided in subsection (c)(1) of section 2550 shall be so affixed to the bottle or other container as to securely seal the stopper, covering, or wrapper thereof.

APPENDIX C

UNITED STATES CODE, TITLE 26

Internal Revenue Code, provides as follows:

Section 2552. Stamps:

(b) Other laws applicable. All the provisions of law relating to the engraving, issuance, sale, accountability, cancellation, and destruction of tax-paid stamps provided for in the internal revenue laws shall, in so far as necessary, be extended and made to apply to the stamps provided in subsection (c) (1) of section 2550.

APPENDIX D

UNITED STATES CODE, TITLE 26

Internal Revenue Code, provides as follows:

Section 2553. Packages:

(a) General requirement. It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession

same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

APPENDIX E

UNITED STATES CODE, TITLE 26

Internal Revenue Code, provides as follows:

Section 2559. Regulations:

(a) Making and publishing. The Secretary shall make, prescribe, and publish all needful rules and regulations for carrying the provisions of this subchapter and part V of subchapter A of chapter 27 into effect.

APPENDIX F

UNITED STATES CODE, TITLE 26

Internal Revenue Code, provides as follows:

Section 2560. Personnel:

(a) Appointment. The Secretary is authorized to appoint such agents, deputy collectors, inspectors, chemists, assistant chemists, clerks, and messengers in the field and in the Bureau of Internal Revenue in the District of Columbia as may be necessary to enforce the provisions of this subchapter and part V of subchapter A of chapter 27.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 44

ROBERT FRAZIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 99–101)[1] is reported at 163 F. 2d 817.

JURISDICTION

The judgment of the Court of Appeals was entered October 6, 1947 (R. 102). On November 5, 1947, Mr. Justice Jackson extended petitioner's time to file a petition for a writ of certiorari to December 5, 1947, and the petition was filed on

[1] The record was printed as a joint appendix to Appellee's Brief in the court below. The page references here are to the pagination of the Appendix, not to the page numbers of the original record, which appear in indentations on the left hand sides of the pages in the Appendix.

that date. The petition was granted April 19, 1948 (R. 103). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (now 28 U. S. C. 1254). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

Whether petitioner's conviction of a narcotic law violation should be set aside because:

1. It is alleged, without any supporting evidence or offer of proof, that those persons summoned for jury duty who indicated they did not care to serve were permitted to stand aside.

2. The jury which heard the case consisted of twelve employees of the United States Government.

3. One juror was the husband of a Treasury Department employee and it is alleged that another juror was employed in the Treasury Department, although neither were challenged by petitioner.

STATEMENT

On June 5, 1944, petitioner was indicted for a violation of the Harrison Narcotic Act[1] (R. 90). On October 9, 1946, the case came on for trial (R. 1). The Assistant United States Attorney identified the defendant, counsel and the witnesses, and asked the prospective jurors whether they knew any of the persons so identified (R. 2).

[1] Section 2553 (a) of the Internal Revenue Code.

One juror stated that she was acquainted with one of the witnesses, and was excused by the court (R. 2–3). The prosecutor then asked:

> Do any of you know why you cannot sit upon this jury and render a fair and impartial verdict purely upon the evidence which is presented, applying to it the law which is given to you by His Honor?

This was answered in the negative. (R. 3.) The same question was asked of, and negatively answered by, each person called to replace a discharged juror (R. 4, 5, 6, 7, 10, 11, 12).

Petitioner's counsel examined the jurors en masse as follows (R. 3):

> Mr. Buckley. How many of the prospective jurors are employed in the Federal Government?
>
> (Jurors indicated by raising hands.)
>
> Mr. Buckley. Would any of you prospective jurors have any prejudice of any kind against any defendant who might be charged with violation of the narcotic law or the Narcotic Act?
>
> (No response.)
>
> * * * * * *
>
> Mr. Buckley. Would any of you jurors give more weight or credence to the testimony of a police officer than you would to any other civilian?
>
> (No response.)
>
> Mr. Buckley. I take it from your silence your answer would be no.

After petitioner's counsel had peremptorily chal-

lenged three jurors (R. 3–4) and one was discharged for cause (R. 5), counsel examined the jurors then in the box as follows (R. 5):

> Mr. BUCKLEY. Do any of you jurors now impaneled have any prejudice against anyone who might be charged with a violation of the narcotic law?
>
> (No response.)
>
> Mr. BUCKLEY. Are any of you jurors related to any member of the Metropolitan Police Department or a narcotic agent?
>
> (No response.)
>
> Mr. BUCKLEY. Are any members of your immediate family employed in the Treasury Department?
>
> Mr. BENJAMIN ROOT [one of the jurors]. My wife is in the Treasury Department.
>
> Mr. BUCKLEY. What branch of the Treasury Department?
>
> Mr. ROOT. Secretary's office.

Mr. Root was not challenged. No other person in the box made any affirmative reply to these questions.

In all, petitioner's counsel challenged seven of the twelve persons originally in the box: William T. Mack (R. 3), Mrs. Marjorie E. Merrick (R. 7), George M. Montgomery (R. 4), Mrs. Catherine N. Moody (R. 8), William O. Parker (R. 4), Walter A. Robinson (R. 5), and Joseph Rode (R. 7). He asked Clarence Vogle, who was not one of the original twelve (R. 1), what his occupation was. Upon learning that Vogle was a "linoleum salesman for asphalt tiling," counsel peremptorily

challenged him (R. 6).[1] James A. Longmore, not among the original twelve in the box (R. 1), was also questioned concerning his occupation. After stating that he was a street car operator, he was peremptorily challenged by petitioner's counsel (R. 11).

After petitioner's counsel had exercised eight peremptory challenges, there were no more prospective jurors immediately available, so court was recessed until the afternoon, when the court expected more jurors to be present (R. 8). On resumption after the recess, petitioner's counsel moved to strike the entire panel, saying (R. 8–9):

> * * * I have made a little investigation of the impaneling or selection of this panel here as well as selection of the other panels sitting this month, and I most respectfully submit that the method and procedure used in selecting is irregular, and I am going to move to strike this whole panel, the reason being this: that from the inquiries I have made, there were about five hundred or five hundred and a few jurors subpenaed—that is, individually subpenaed to appear here—from which they selected a sufficient number of jurors here.
>
> If there were five hundred, they were divided into two groups, two hundred fifty

[1] The record at this point fails to show who challenged Vogle. However, he must have been challenged by petitioner's counsel since the latter used all of his 10 peremptory challenges (R. 12).

> for one court and two hundred fifty for another court, and of the two hundred fifty for each court, they were asked how many of those two hundred fifty did not desire to serve as jurors, to raise their hands, so those who raised their hands were told to step to one side, and out of the remaining number that were left they picked the jurors, and the remaining number that were left consisted mostly of Government employees and housewives, and unemployed. There are only a few unemployed.

This motion was denied with leave to renew it by way of a motion for a new trial in the event of conviction (R. 9).

After petitioner's counsel had exhausted his ten peremptory challenges, he asked the twelve jurors in the box how many were employed by the Government. Each of the twelve indicated he was (R. 12). Thereupon, counsel challenged the jury for cause, saying (R. 12–13):

> In selecting these different panels on the first Tuesday of the month, the Clerk says to the five hundred or two hundred fifty, whichever it may be, individuals who are summoned to appear here, from which to pick the juries, "All those who do not desire to serve, step to one side."
>
> That leaves a batch of Government employees and housewives.
>
> Now, I have exhausted my ten challenges, and here I have twelve Government jurors who are to decide this defendant's case,

> which is a violation of the Federal statute, being brought in a Federal Court, prosecuted by a Federal prosecutor, and the case is presented by Federal agents. I submit there is reason to challenge these people for cause.

The motion was denied, with leave to renew it by motion after verdict (R. 13).

At the close of the testimony, petitioner renewed his motion based on "the method by which this particular panel was selected on the first Tuesday of October"; the motion was denied (R. 64–65).

After the verdict of guilty was returned, petitioner moved in arrest of judgment on the ground, *inter alia*, that the panel from which the jury was chosen "did not contain a truly representative group of a cross section of the inhabitants of the District of Columbia, economically, socially, religiously, and politically, educationally and racially," and that "Government employees represented a disproportionately larger number of prospective jurors, than if this particular panel had been drawn and selected in compliance with the law" (R. 91–92). This motion was also denied, as was a motion for a new trial (R. 92). Petitioner was sentenced to imprisonment for a period of twenty months to five years and to pay a fine of $2,000 (R. 92–93).

On appeal, petitioner not only objected to the jury because persons not desiring to serve were

allowed to stand aside, but also urged as a ground for reversal the fact that Root, husband of a Treasury Department employee, and Moore, who he alleged was a messenger in the office of the Secretary of the Treasury, were members of the jury.[4]

The court below affirmed the conviction (R. 99–101).

SUMMARY OF ARGUMENT

1. The challenge to the array was not timely because it was not made until the time of trial, and then was delayed until after individual jurors had been challenged.

Furthermore, petitioner wholly failed to meet his burden of offering evidence in support of his challenge to the panel, and the facts alleged were at no time admitted by either the prosecution or the court.

Permitting prospective jurors who wished to be excused to stand aside while the remainder were examined would be justified as a reasonable administrative procedure for expediting the work of the court. Petitioner has not shown that the procedure allegedly adopted resulted in a jury panel any less representative of the community than would have resulted if the alleged procedure had not been followed. It has long been held that the excuse of jurors without sufficient

[4] Petitioner has abandoned his objections to the conviction on the merits.

cause does not constitute error where it is not shown that the exclusion resulted in the presence of any unqualified jurors or that the jury as finally constituted was improper as a result of the unauthorized excuse.

A jury consisting of twelve government employees is not *per se* invalid. Petitioner has not shown that the exclusively federal employee composition of the jury which tried his case was caused by the procedure allegedly followed here. The record at least indicates the possibility that petitioner's counsel exercised his ten peremptory challenges, not for the purpose of ridding the jury of an excess of government employees, but rather for the opposite purpose of overweighting it with such persons. No prejudice to petitioner has been shown, and there is no reason for this Court's exercising its supervisory jurisdiction over lower federal courts.

There is not even an allegation of "systematic and intentional" exclusion of any classes or groups of persons from the jury panel. A strong showing of such purposeful and systematic exclusion is required to sustain an attack on a jury panel as not representing a proper cross-section of the community. In any event, government employees as such do not constitute an economic or social class, but rather include persons from practically all social, economic, religious, educational and racial groups within the community.

2. By failing to challenge jurors Moore and

Root because they were an employee and the husband of an employee, respectively, in the Office of the Secretary of the Treasury, petitioner waived any objection to them. The doctrine of waiver applies both as to Root, whose alleged ground of disqualification was learned on voir dire examination, and as to Moore, who was not questioned as to his employment. This rule is established at common law, and is specifically provided by statute in the District of Columbia.

Employment in or relationship to one employed in the Office of the Secretary of the Treasury would not automatically constitute a ground of disqualification for service on a jury in a narcotic violation case. The Secretary of the Treasury's functions with respect to narcotic laws have lawfully been delegated to the Bureau of Narcotics, which is a statutorily created, semi-autonomous bureau within the Department.

In order to object to Root and Moore, petitioner would have to show actual bias. He has not alleged actual bias, nor did he examine them as to actual bias. On the contrary, both stated on voir dire examination that they knew of no reason why they could not render a fair and impartial verdict, and denied having any prejudice against persons charged with violating the narcotic laws.

ARGUMENT

I

PETITIONER'S CHALLENGE OF THE PANEL WAS PROPERLY REJECTED

A. The motion to quash the panel was not timely

The selection of the jury was commenced the morning of October 9, 1946. After petitioner's counsel had exercised eight peremptory challenges, the Government had used one (R. 6), one prospective juror had been excused by the court *sua sponte* (R. 2–3), and one had been discharged for cause on the suggestion of petitioner's counsel (R. 5), there were no more jurors immediately available, so the case was recessed until 2:30 p. m., when it was expected that more jurors would be present (R. 8). It was not until after the recess (R. 8) that petitioner first questioned the composition of the array.

As ground for the challenge, petitioner alleged facts occurring the first Tuesday of the month, eight days before this case was called for trial (R. 8). As suggested by the trial court, the challenge may well have been late because not made until the time of trial (R. 9). Cf. *United States* v. *Brookman*, 1 F. 2d 528, 537 (D. Minn.), affirmed, 8 F. 2d 803 (C. C. A. 8).

In any event, it was untimely because made after there had been challenges of individual members. A challenge to the panel or array is

an attack on the method of drawing or the composition of the entire panel, without reference to the possible disqualification of individual members. As such, it is preliminary to challenges of individuals and must be made before any individuals are challenged. In *United States* v. *Loughery*, 13 Blatch. C. C. 267, 270 (E. D. N. Y.), the defendant challenged individual talesmen on the ground that in obtaining talesmen the court officer had brought in persons who had not been present in the courtroom. It was held that the persons brought in did qualify as talesmen, the court adding:

> It would seem further that this objection was taken too late. The fact relied on, if of any effect, constituted a ground of challenge to the array, and the point should be raised by challenging the array before any of the tales were drawn. (*Bac. Abr., Juries, vol. 5, pp. 345, 352*). Here, the point was first taken as a ground of principal challenge to the polls. After a challenge to the polls if was too late to challenge the array.

Section 269 of the official draft of the American Law Institute's *Code of Criminal Procedure* (p. 108) provides:

> Challenges to the panel shall be made and decided before any individual juror is examined.

This is in accord with the practice in those states where the order of challenges is prescribed by

statute. *Ibid.*, pp. 817–818. See, also, Thompson and Merriam *On Juries*, §§ 266, 275 (1), pp. 284, 302–303; Co. Litt. 158a; Joy, *On the Admissibility of Confessions and Challenge of Jurors in Criminal Cases in England and Ireland* (Am. ed.), p. 106.

Petitioner has advanced no excuse for the tardiness of his challenge to the array. The delay is rendered particularly inexcusable by the implied allegation that the procedure objected to was customary in the court (R. 12). There is no apparent reason why petitioner's counsel could not have made his "little investigation" (R. 8) earlier and have been prepared at the proper time to present his motion to quash the panel and substantiate his objections. We submit, therefore, that there is no basis for deviating from the accepted rule that a challenge to the array must be made at the earliest possible moment and is waived by delay, particularly by proceeding to challenge individual members of the panel.

B. Petitioner did not meet his burden of sustaining the challenge to the array

In first moving to quash the panel, petitioner's counsel stated that he had "made a little investigation of the impaneling or selection of this panel here as well as the selection of the other panels sitting this month" and "from the inquiries I have made" (R. 8), he alleged that those prospective jurors who did not desire to serve were

permitted to step aside. Three times subsequently he reasserted his objection to the panel (R. 13, 64, 91–92), but on no occasion did he offer evidence to prove his unsworn, manifestly hearsay allegation.

It has uniformly been held that a challenge to a jury panel must be rejected unless it is supported by evidence. In *Glasser* v. *United States*, 315 U. S. 60, the petitioners objected to the alleged exclusion from the jury panel of all women except members of a particular private organization. This Court held that, although the facts alleged, if proved, would have required the granting of a new trial, the petitioner's failure to present proof of the allegations was fatal to their motion. The Court said (at p. 87):

> * * * from the record before us we must conclude that petitioners' showing is insufficient. The Government did not controvert the affidavits by counter-affidavits or former denial, and it does not appear from the record that any argument was heard on them. From this, petitioners argue that the allegations of the affidavits are to be taken as true for the purpose of the motion. However, this is not a case where the prosecution has impliedly, *Neal* v. *Delaware*, 103 U. S. 370, or actually, *Hale* v. *Kentucky*, 303 U. S. 613, stipulated that affidavits in support of a motion alleging the improper constitution of a jury may be accepted as proof. In the absence

of such a stipulation, it is incumbent on the moving party to introduce, or to offer, distinct evidence in support of the motion; the formal affidavit alone, even though uncontroverted, is not enough. *Smith* v. *Mississippi*, 162 U. S. 592; *Tarrance* v. *Florida*, 188 U. S. 519; cf. *Brownfield* v. *South Carolina*, 189 U. S. 426. Glasser in his affidavit, offered to prove the allegations contained therein, but the record is barren of any actual tender of proof on his part. Furthermore, there is no indication that the court refused to entertain such an offer, if it were in fact made. Roth did not even make an offer of proof in his affidavit, and Kretske did not file one. While it is error to refuse to hear evidence offered in support of allegations that a jury was improperly constituted, *Carter* v. *Texas*, 177 U. S. 442, there is, and, on the state of this record, can be, no assertion that such error was here committed. The failure of petitioners to prove their contention is fatal.

See also, *Martin* v. *Texas*, 200 U. S. 316; *Quinones* v. *United States*, 161 F. 2d 79, 81 (C. C. A. 1), certiorari denied, 331 U. S. 833; *Mamaux* v. *United States*, 264 Fed. 816, 819 (C. C. A. 6); *Hollingsworth* v. *Duane*, Wall. C. C. 147, 171 (E. D. Pa.) (digest report in 4 Dall. 353). Cf., also, *Kempe* v. *United States*, 160 F. 2d 406, 409 (C. C. A. 8), certiorari denied, 331 U. S. 843; *Wilkes* v. *United States*, 291 Fed. 988, 990 (C. C. A. 6); *United States* v. *662.44 Acres of*

Land, More or Less, 45 F. Supp. 895, 897 (E. D., Ill.), involving objections to individual jurors.

There is nothing in the present record from which an admission or concession of the facts alleged could conceivably be inferred. In first moving to quash the panel, petitioner's counsel contended that permitting some of the jurors to step aside invalidated the panel, citing *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217 (R. 8–9). The court denied the motion because of the absence of any allegation that there had been any systematic or intentional exclusion of any classes of the community from the panel, and indicated that in any event the motion was probably too late (R. 9). After the jury was finally selected, petitioner renewed his objection (R. 12), which the court immediately denied, with leave to renew it after verdict (R. 13). At the end of the testimony, he again renewed his objection (R. 64), which the court summarily rejected (R. 65). On October 23, 1946, the contention was reasserted in a written motion in arrest of judgment (R. 91–92). This motion was unsworn, was not accompanied by an affidavit, and contained no offer of proof. The Government's failure specifically to deny facts so alleged, even when reduced to writing in the form of a motion, does not constitute an admission thereof. *Brownfield* v. *South Carolina*, 189 U. S. 426, 428. There was no occasion for the prosecution either to admit or to deny

the allegations, since the court disposed of the motions summarily, on the ground, in effect, that the facts alleged, even if proved, were insufficient to require quashing the panel, since no systematic exclusion of classes of prospective jurors was alleged.

Nor would the record support any inference of a judicial admission of the facts alleged. The claimed irregularity occurred in the general selection of jury panels for all divisions of the district court.[5] Petitioner does not claim that the judge in this case knew of the adoption of the alleged procedure by the clerk (R. 12). Moreover, even if he did have personal knowledge, his silence could not be construed as a judicial admission. In *Wolf* v. *United States*, 292 Fed. 673, 678 (C. C. A. 6), defendant objected to the jury panel because it consisted of persons who had been present at a prior trial in a related case, when the judge had dismissed one juror because he alone had held out for a verdict of acquittal. In upholding the judge's denial of the challenge of the panel, the circuit court of appeals said:

> Upon the challenges to the array and the panel no proof of the matters contained therein was made or offered, and a majority of the court is of opinion that a challenge of this nature falls within the general rule recognized in *Mamaux* v. *United*

[5] Grand juries and petit juries for all divisions of the District Court are drawn from the same lists. Section 11-1407 of the District of Columbia Code, 1940.

> *States* (C. C. A. 6) 264 Fed. 816, 818 et seq., and *Smith* v. *Mississippi*, 162 U. S. 592, 16 Sup. Ct. 900, 40 L. Ed. 1082; *Martin* v. *Texas*, 200 U. S. 316, 26 Sup. Ct. 338, 50 L. Ed. 497, as to requirement of proof or offer of proof of fact in support of the challenge. Nor do we find in the record or in briefs of counsel an admission by either court or counsel of the truth of the statements as to the Mahanmah incident, although we find no denial thereof. True, the truth or falsity of the asserted facts was within the knowledge of the trial judge; but, in the opinion of a majority of this court, his failure to assert their falsity cannot be accepted as a judicial admission of their truth.

To the same effect is the related case of *Hindman* v. *United States*, 292 Fed. 679 (C. C. A. 6).[6]

C. The facts alleged, even if proved, would not require quashing the panel

Petitioner has not provided any factual details concerning the procedure allegedly followed in

[6] In these cases the facts alleged, if true, resulted in there being disqualified persons on the jury. The alleged facts would have created a "natural presumption of prejudice." *Boyles* v. *United States*, 295 Fed. 126, 127 (C. C. A. 6). In the interest of justice, because of the special circumstances presented, the circuit court of appeals in the *Wolf* and *Hindman* cases, while affirming the convictions, directed the district court to entertain new motions for a new trial, on which defendants would have an opportunity to prove the facts alleged. In the instant case, there are no such special circumstances dictating the exercise of the court's discretionary power to afford petitioner a second opportunity to rectify his initial deficiency.

the drawing of the jury panel. At one point counsel stated simply that the clerk of court permitted any prospective juror who did not care to serve to step aside (R. 12). It is not disclosed whether this action was taken in the presence of or under the direction of a judge of the court; nor does it appear whether the prospective jurors were given any instructions or advice concerning the permissible grounds for excuse. It is not alleged that any jurors were excused, but simply that some were permitted to stand by. At most, all that is alleged is that the order of calling jurors was changed. Cf. *Taylor* v. *United States*, 80 F. 2d 604, 606 (C. C. A. 5), certiorari denied, 297 U. S. 708. Perhaps what happened was that, for the purpose of expediting the business of the court, to prevent the court's having to wait until all requests to be excused were passed on before proceeding with the drawing of panels, the court made those persons who believed they were eligible to be excused wait until the rest were examined before passing on their requests for excuse. This, we submit, is a reasonable administrative procedure for expediting the court's business. As this Court said in *Fay* v. *New York*, 332 U. S. 261, 271:

> In a metropolis with notoriously congested court calendars we cannot find it constitutionally forbidden to set up administrative procedures in advance of trial to eliminate from the panel those who, in a

> large proportion of cases, would be rejected by the court after its time had been taken in examination to ascertain the disqualifications.

It cannot be said on the present record that petitioner was denied the presence of any jurors who were not eligible for excuse under Section 11–1419 of the District of Columbia Code, 1940, which provides broadly:

> A person may be excused by the court from serving on a jury when for any reason his interest or those of the public may be materially injured by his attendance * * * * or where his own health or the death or sickness of a member of his family requires his absence.[7]

Petitioner has not stated how many, if any, persons actually stepped aside when permitted to do so. Thus, it cannot be said that he was deprived of the presence of any eligible prospective jurors.[8]

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[7] Cf. *Thiel* v. *Southern Pacific Co.*, *supra*, 328 U. S. at 224: "It is clear that a federal judge would be justified in excusing a daily wage earner for whom jury service would entail an undue financial hardship."

[8] In *Romney* v. *United States*, 167 F. 2d 521 (App. D. C.), certiorari denied, 334 U. S. 847, the defendant objected to the method of impaneling the grand jury in the District of Columbia in January 1947. The record in that case (O. T. 1947, No. 753, pp. 406–407) shows that Chief Judge Laws presided at the drawing of the jury panels, and specifically instructed prospective jurors not to request to be excused without "a very pressing reason."

In his motion in arrest of judgment, petitioner said (R. 91-92):

> That at the time of the selection of the jury panel for this court, Government employees represented a disproportionately larger number of prospective jurors, than if this particular panel had been drawn and selected in compliance with the law in selecting jurors for the various panels of the Courts.

Petitioner made no attempt, however, to show the occupations of those persons, if any, who stepped aside. Further, he has not stated that those persons, if any, who initially stood aside were ultimately excused because not needed. For all the present record shows, it is possible that the number of persons willing to serve was not sufficient to meet the needs of the courts, and that those who stood aside were subsequently examined as to their excuses and those found ineligible for excuse were assigned to specific courts, including the division in which petitioner was tried.

Petitioner has not shown the composition of the panel from which the jury was selected in this case. The record makes its clear, however, that it did contain persons who were not employed in the Government. In denying the motion to quash the panel, the trial judge said (R. 13):

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> Chance has resulted in this jury panel of twelve being composed of Government employees, but the jury list from which they by chance were selected is a mixture of Government employees and private employees.

The judge may well have been unduly magnanimous in stating that "chance" accounted for the fact that the jury finally selected consisted exclusively of government employees. At the very outset of the impaneling, before exercising any challenges, petitioner's counsel asked the prospective jurors to indicate whether they were employed by the government (R. 3). He made no objection to the panel at that time. Of the twelve in the box at that time, petitioner peremptorily challenged seven (R. 3, 4, 4, 5, 6, 7, 7,). It is possible that none of these seven was employed in the government.[9] Of the replacements, two were asked their occupations. When Clar-

[9] The fact is that none of these seven was employed in the government. It is the general practice in the criminal divisions of the District Court for the District of Columbia to have prepared lists of jury panels, showing the name, age, address and occupation of each member. Such lists are available to counsel before trial on request. The list in the present case shows the following occupations of the seven persons peremptorily challenged by petitioner from the original twelve in the box; William T. Mack, mechanic; Mrs. Marjorie E. Merrick, housewife; George M. Montgomery, mechanic; Mrs. Catherine N. Moody, housewife; William O. Parker, public radio service; Walter A. Robinson, General Electric Service Department; Joseph Rode, gas station owner. A copy of the jury panel list for this case is reprinted as Appendix A to this brief, *infra*, pp. 44.

ence A. Vogle stated that he was a "linoleum salesman for asphalt tiling," he was asked no further questions, but was peremptorily challenged by petitioner (R. 6). Similarly, petitioner peremptorily challenged James A. Longmore after he disclosed that he was a street car operator (R. 11). It should be recalled that petitioner's counsel did not object to the number or proportion of government employees on the jury panel when he first had them identified, but waited until after he had exercised all his ten peremptory challenges. It is not beyond the realm of possibility that counsel exercised his peremptory challenges, not for the purpose of excluding government employees, whom he professes to find objectionable, but rather for the purpose of excluding as many non-government employees as possible, thus overweighing the jury with federal workers, so as to lay the foundation for the contention now made.[10] The existence of this possibility most dramatically demonstrates the practical considerations underlying the strict rule that in challenging a jury panel one must fully prove his allegations.

Petitioner has not shown that as a result of the procedure allegedly followed he was tried by a jury which was improperly constituted or which contained any disqualified persons. The most he

[10] As we have seen, this is more than a mere theoretical possibility. Nine of the ten persons peremptorily challenged by petitioner were not government employees.

can be said to have claimed is that possibly some qualified persons summoned for jury service were not made available to him. It has long been established, however, that—

> The right to challenge is the right to reject, not to select a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained. [*Hayes* v. *Missouri*, 120 U. S. 68, 71.]

See, also, *Spies* v. *Illinois*, 123 U. S. 131, 168; *Hopt* v. *Utah*, 120 U. S. 430, 436; *Northern Pac. R. R. Co.* v. *Herbert*, 116 U. S. 642, 646; *Smith* v. *United States*, 112 F. 2d 217, 218–219 (App. D. C.), certiorari denied, 311 U. S. 663; 1 Thompson, *Trials* (2d ed.) § 120.

It has been uniformly held in the federal courts that one cannot object to the exclusion or absence of prospective jurors without sufficient cause, unless he affirmatively shows that he has been prejudiced thereby. *United States* v. *Chapman*, 158 F. 2d 417, 419 (C. C. A. 10); *Shettel* v. *United States*, 113 F. 2d 34–36 (App. D. C.); *Kloss* v. *United States*, 77 F. 2d 462, 463 (C. C. A. 8); *Simpson* v. *United States*, 184 Fed. 817, 819 (C. C. A. 8); *Marande* v. *Texas & P. Ry. Co.*, 124 Fed. 42, 44–45 (C. C. A. 2), appeal dismissed, 197 U. S. 626; *Southern Pac. Co.* v. *Rauh*, 49 Fed. 696, 702 (C. C. A. 9); *United States* v. *Byrne*, 7 Fed. 455, 458–459; (S. D. N. Y.); *United States* v. *Cornell*, 25 Fed. Cas. 650, 656, No.

14,868 (C. C. D. R. I.). Similarly it has been held that an attack on the panel or array cannot be sustained in the absence of a showing of prejudice resulting from the claimed irregularity in drawing the panel or array, for either the grand or petit jury. *Hyde* v. *United States*, 225 U. S. 347, 374; *Rawlins* v. *Georgia*, 201 U. S. 638, 640; *Agnew* v. *United States*, 165 U. S. 36, 44; *Northern Pac. R. R. Co.* v. *Herbert*, *supra*; *Medley* v. *United States*, 155 F. 2d 857, 859 (App. D. C.), certiorari denied, 328 U. S. 873; *United States* v. *Parker*, 103 F. 2d 857, 859, 862 (C. C. A. 3), certiorari denied, 307 U. S. 642; *Morrison* v. *United States*, 71 F. 2d 358, 359 (C. C. A. 5), certiorari denied, 293 U. S. 589; *Brookman* v. *United States*, 8 F. 2d 803, 806–807 (C. C. A. 8), affirming, 1 F. 2d 534 (D. Minn.); *Moffatt* v. *United States*, 232 Fed. 522, 528 (C. C. A. 8).

Thiel v. *Southern Pacific Co.*, 328 U. S. 217, and *Ballard* v. *United States*, 329 U. S. 187, 195 (followed in *Zap* v. *United States*, 330 U. S. 800), impose some restriction on the previously long standing, undeviating requirement that a challenge to the composition of a jury panel must in every case be supported by a clear showing of prejudice to the party objecting. In those cases, this Court, in the exercise of its supervisory jurisdiction over lower federal courts, sustained attacks against the composition of jury panels without any specific showing of prejudice to the

defendant. The procedures objected to there, however, were of a substantial nature, involving systematic exclusion of classes from the jury panel. Purposeful courses of conduct had been adopted, which, if continued, by their nature would have tended to affect the rights of parties. In the present case there is no such situation calling for the exercise of the Court's supervisory jurisdiction.

As is clearly shown by the later case of *Fay v. New York, supra,* prejudice must be shown to support a constitutional objection to the composition of a jury panel on any ground other than racial discrimination. In that case the Court said (332 U. S. at 292–294):

> Nor is there any such persuasive reason for dealing with purposeful occupational or economic discriminations if they do exist as presumptive constitutional violations, as would be the case with regard to purposeful discriminations because of race or color. We do not need to find prejudice in these latter exclusions, but cf. *Strauder v. West Virginia*, 100 U. S. 303, 306–309, for Congress has forbidden them, and a tribunal set up in defiance of its command is an unlawful one whether we think it unfair or not. But as to other exclusions, we must find them such as to deny a fair trial before they can be labeled as unconstitutional.
>
> * * * The defendants have shown no intentional and purposeful exclusion of

> any class, and they have shown none that was prejudicial to them. They have had a fair trial, and no reason appears why they should escape its results.

Petitioner has advanced no basis for a claim of prejudice.[11] As shown above, he has totally failed to support even the contention that the procedure objected to resulted in, or would normally tend to result in (cf. *United States* v. *Local 36 of International Fishermen*, 70 F. Supp. 782, 799 (S. D. Cal.)), the disproportionate weighting of the jury with government employees. The absence of evidence concerning the persons, if any, who stepped aside and the actual composition of the panel in this case is fatal to any possible claim of prejudice. And the lack of any showing of prejudice is, in turn, fatal to petitioner's constitutional objection to the procedure allegedly followed.

At one point (R. 13) petitioner frankly relied upon the broad contention that any irregularity in the impaneling of a jury amounts to prejudice as a matter of law. We submit, however, that this contention is not supported by the cases, but, on the contrary, the cases above cited establish the exact opposite. Even the *Thiel* and *Ballard* cases assume that an irregularity in impaneling a jury does not necessarily cause prejudice; they merely hold that under certain circumstances it is not necessary to show prejudice.

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[11] The procedure allegedly followed here is in no manner causally related to the presence of the two individual jurors to whom petitioner specifically objects. Their qualification is discussed in Point II, *infra*.

Perhaps more fundamental than petitioner's failure to show prejudice is the absence of any allegation of a systematic, purposeful or intentional exclusion of any classes from the jury. As said in the *Fay* case, *supra* (332 U. S. at 284–285):

> It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a particular jury is not enough; there must be a clear showing that its absence was caused by discrimination, and in nearly all cases it has been shown to have persisted over many years. *Virginia* v. *Rives*, 100 U. S. 313, 322–23; *Martin* v. *Texas*, 200 U. S. 316, 320–21; *Thomas* v. *Texas*, 212 U. S. 278, 282; *Smith* v. *Texas*, 311 U. S. 128; *Hill* v. *Texas*, 316 U. S. 400; *Akins* v. *Texas*, *supra*. Also, when discrimination of an unconstitutional kind is alleged, the burden of proving it purposeful and intentional is on the defendant. *Tarrance* v. *Florida*, 188 U. S. 519; *Martin* v. *Texas*, 200 U. S. 316; *Norris* v. *Alabama*, 294 U. S. 587; *Snowden* v. *Hughes*, 321 U. S. 1, 8–9; *Akins* v. *Texas*, 325 U. S. 398, 400.

Cf. *Moore* v. *New York*, 333 U. S. 565; *Quinones* v. *United States*, 161 F. 2d 79, 81; *Wong Yim* v. *United States*, 118 F. 2d 667, 668 (C. C. A. 9), certiorari denied, 313 U. S. 589; *Mamaux* v. *United States*, 264 Fed. 816; *United States* v. *Local 36 of International Fishermen*, 70 F. Supp. at p. 790.

Even in the *Thiel* and *Ballard* cases, where ob-

jections to jury panels were upheld without any showing of actual injury, the requirement of a showing of purposeful and systematic exclusion was maintained. The *Thiel* case merely held that (328 U. S. at 220):

> * * * prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these [economic, social, religious, racial, political, and geographical] groups. . . .

The *Ballard* case condemned only "the purposeful and systematic exclusion of women from the panel" (329 U. S. at 193). In the present case there is no contention of exclusion of any classes from jury service. Certainly there is no allegation of any systematic action by the court calculated to exclude any classes of the community. Whatever irregularity there may have been was entirely unsystematic.

The instant case presents at most a minor irregularity and no substantial error. It in no way tends to undermine "civilized standards of procedure and evidence." Cf. *McNabb* v. *United States*, 318 U. S. 332, 340. It would not tend to "undermine and weaken the institution of jury trial," *Thiel* v. *Southern Pacific Co.*, *supra*, at p. 224; nor would it amount to an "injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard* v. *United States*, *supra*, at p. 195. We submit,

accordingly, that if any error was committed in this case, it was purely harmless error, and the conviction should stand. Rule 52 of the Federal Rules of Criminal Procedure; cf. 18 U. S. C. 556.[12]

D. That the jury consisted exclusively of government employees does not warrant quashing the panel

Government employment does not disqualify one for jury service. District of Columbia Code, 1940, § 11–1420; *United States* v. *Wood*, 299 U. S. 123; *Higgins* v. *United States*, 160 F. 2d 222 (App. D. C.), certiorari denied, 331 U. S. 822; *Kempe* v. *United States*, 160 F. 2d 406, 409 (C. C. A. 8), certiorari denied, 331 U. S. 843; *Great Atl. & Pac. Tea Co.* v. *District of Columbia*, 89 F. 2d 502 (App. D. C.), certiorari denied, 301 U. S. 691. Nor can it be argued that a jury composed exclusively of government employees is objectionable *per se*. *Schackow* v. *Government of the Canal Zone*, 108 F. 2d 625 (C. C. A. 5). That specific classes were not represented on the jury (*Ruthenberg* v. *United States*, 245 U. S. 480, 481–482) or that the jury consisted of but one group does not establish that a defendant has been denied a fair trial by an impartial jury. *Thomas* v. *Texas*, 212

[12] In *Fay* v. *New York*, *supra*, it was complained that prospective jurors were asked to specify the months in which they would prefer to serve, with the many who stated a preference being excluded from the special panel. These admitted circumstances were regarded by this Court as only "an administrative ineptitude of no constitutional significance and of no prejudice to these defendants" (332 U. S. at p. 278).

U. S. 278, 282; *Martin* v. *Texas*, 200 U. S. 316, 320–321; *United States* v. *Brady*, 133 F. 2d 476, 480 (C. C. A. 4), certiorari denied, 319 U. S. 746, rehearing denied, 319 U. S. 784.

In *Higgins* v. *United States*, 160 F. 2d 222 (App. D. C.), which, like the present, involved a narcotic law violation, nine of the twelve jurors were government employees. The court rejected the defendant's attack on the jury as not being a representative cross-section of the community, saying (at p. 223):

> * * * we think the motion, whenever made unsustainable for the reason that its only basis is that the jury included nine Government employees, none of whom was employed in the particular branch of the Government charged with the administration of the narcotic laws;[13] and each of whom, when asked on his examination if his employment would in any way influence his judgment, replied in the negative. Unless therefore a disqualification inhered in the fact of the employment relationship, the point is without merit. And that such a relationship is not a bar was clearly decided by the Supreme Court over ten years ago. Moreover, the doctrine of fair cross-section applies to the names placed in the box from which potential jurors are drawn, not to each twelve who happen, after challenges, to remain on a jury.

[13] The presence of a Treasury Department employee and the husband of such an employee on the jury in the instant case is discussed in Point II, *infra*.

> Here, presumably, such names as were placed in the box embraced all classes and all sections. That many are government employees is a necessary incident of the greater preponderance of government employment over private employment in the District of Columbia. Even in this respect, it cannot be properly contended that the resulting conditions fail to measure up to what is termed a fair cross-section.

The mere fact of government employment has no tendency whatsoever to indicate prejudice against a criminal defendant. As this Court said in *United States* v. *Wood*, *supra*, 299 U. S. at 149:

> Why should it be assumed that a juror, merely because of employment by the Government, would be biased against the accused? In criminal prosecutions the Government is acting simply as the instrument of the public in enforcing penal laws for the protection of society. In that enforcement all citizens are interested. It is difficult to see why a governmental employee, merely by virtue of his employment, is interested in that enforcement either more or less than any good citizen is or should be. * * *

The record does not disclose the government agency in which each of the jurors worked nor the capacity in which he was employed.[11] Govern-

[11] The jury panel list reproduced as Appendix A, *infra*, pp. 44, shows the following employment among the jurors in this case: Benjamin Root, War Department, supervisor; Charlotte E. Jones, War Department, typist; James J.

ment employment runs practically the complete gamut of occupations. Wages and salaries and the methods of payment vary greatly within the federal service. As of October 1946, when this case was tried, annual salaries within the classified civil service ranged from $1,080 to $10,000 (42 Stat. 1491, as amended by 60 Stat. 216, 219, 5 U. S. C. 673). In 1947 hourly rates of pay for employees whose compensation was fixed by wage boards ranged from 70 cents to $1.59, and a similarly wide range was shown in daily wage rates and in the compensation of postal employees. *Pay Structure of the Federal Civil Service, 1947* (U. S. Civil Service Commission, Pamphlet 33, March 1948). Because of the broad scope of governmental activities and the practically unlimited variety of occupations within the government service, it can hardly be said that government employees in any true sense constitute a class. That their compensation comes from the United

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Lawlor, Federal Public Housing Agency, engineer; John C. Lazarus, Reconstruction Finance Corporation, accountant; Mary B. Staves, War Department, clerk; Herbert F. Stames, Post Office, carrier; Alexander Moore, Treasury Department, messenger. Margaret T. Lorenz, Floyd F. Grayson, William E. Brown, Jason E. Barr and Paul D. N. Leman are not listed. Apparently they were "borrowed" from the civil jury panel, since the record shows that some persons from the civil panel were used in this case (R. 12). We have, however, secured a copy of the final list of jurors in this case, which we are reprinting as Appendix B hereto, *infra*, pp. 45. It shows that James E. Barr was a division chief, Department of Agriculture; William E. Brown, clerk, Post Office Department; Floyd F. Grayson, mail carrier; Margaret T. Lorenz, clerk, Army Air Forces.

States is scarcely enough to provide such homogeneity among otherwise diverse persons as to create a social or economic class distinct from other wage earners and salaried workers. Thus, even if petitioner had supported his contention that the procedure allegedly adopted in this case resulted in there being a disproportionate number of government employees on the jury panel, he would not have demonstrated that any social or economic class was over-represented.

On the prosecution's examination, each juror stated that he knew of no reason why he could not render an impartial verdict (R. 3, 4, 5, 6, 7, 10, 11, 12). Petitioner had full opportunity to examine the prospective jurors concerning actual prejudice or bias and he availed himself of this opportunity to the extent that he saw fit. We believe it would do violence to the basic principles of jury trial to hold that petitioner was denied trial by an impartial jury on the bare showing that after he had exercised ten peremptory challenges he was tried by a jury composed of twelve government employees. And this is the only fact alleged which is actually shown on the record.

II

PETITIONER'S OBJECTION TO TWO MEMBERS OF THE JURY WAS WAIVED BY FAILURE TO CHALLENGE, AND, IN ANY EVENT, IS WITHOUT MERIT

Petitioner contends that his conviction cannot stand because the jury which convicted him con-

tained an employee of the Treasury Department and the husband of such an employee.

The fact that juror Root's wife was employed, in an undesignated capacity, in the Office of the Secretary of the Treasury was elicited by counsel on voir dire examination at a time when he had remaining six peremptory challenges (R. 5). Yet he did not challenge Root either for cause or peremptorily.

Juror Moore, who is alleged to have been a messenger in the Office of the Secretary of the Treasury (Pet. 10), was one of the first twelve jurors presented (R. 1). He answered a series of questions to the effect that he was a government employee (R. 3); that he was not related to any member of the Metropolitan Police, the Federal Bureau of Investigation or any narcotic enforcement officer (R. 3); that no member of his immediate family was employed in the Treasury Department (R. 5); that he had no prejudice against anyone charged with violation of the narcotic laws (R. 3); and that he knew of no reason why he could not render a fair and impartial verdict (R. 3). Although petitioner had full opportunity to examine prospective jurors, he did not see fit to inquire whether any of them was employed in the Treasury Department, and

Moore's employment was not brought out at the trial."[15]

Although the record shows that neither Root nor Moore was individually challenged, petitioner apparently claims the right at this time to urge their disqualification as a ground for setting aside the verdict because he challenged the array for cause (Pet. 6). A challenge to the panel or array is based upon an irregularity in the drawing or composition of the panel, which affects the entire panel in common. Such a challenge is not the proper method of raising an objection to a particular juror. *United States* v. *662.44 Acres of Land, More or Less*, 45 F. Supp. 895, 897; Joy, *op. cit.*, p. 103. Petitioner never advanced Moore's employment by the Treasury Department or Root's relationship to a Treasury Department employee as a ground for challenge. He cannot now avail himself of grounds not stated at the time of challenge. *Southern Pac. Co.* v. *Rauh*,

[15] Apparently this fact was learned after trial, while the case was pending on appeal. Moore's occupation, however, was shown on the jury list referred to in note 7, *supra*.

Petitioner states (Pet. 11) that Moore's employment in the Treasury Department was admitted by the prosecution in its "Answer to Supplemental Memorandum in Support of Application for Reconsideration of Motion for Bail Pending Appeal." That document, filed in the Court of Appeals on December 18, 1946, says: "The Court records show that, while each of the twelve jurors was a government employee, only one was an employee of the Treasury Department, and he a messenger in the Office of the Secretary of the Treasury." Petitioner had stated that two of the jurors were Treasury employees.

supra; Co. Litt. 158a; *Luke* v. *Clerk,* (1615) Moore, K. B., 846. If a blanket challenge to the entire panel were sufficient to constitute a challenge of each member thereof, without any statement of specific grounds applicable to each, it is doubtful whether any convictions could ever stand. As was said in *Hollingsworth* v. *Duane,* Wall. C. C. 147, 152:

> The causes of challenge are infinite; and perhaps not one jury in ten are sworn, that if the situations, connections, interests and qualifications of each juror was critically inquired into after verdict, some one or more would not be found, in some capacity, to be subject of challenge.

The common law rule that challenges must be taken before the jurors are sworn (5 Bac. Abr., Juries E, 11; Co. Litt. 158a; 1 Chitty, *Criminal Law,* *533; *Green* v. *Dennis,* Cro. Eliz., 845) has been consistently followed in the federal courts. *Queen* v. *Hepburn,* 7 Cranch 290; *United States* v. *Gale,* 109 U. S. 65, 72; *Kohl* v. *Lehlback,* 160 U. S. 293; *Strang* v. *United States,* 53 F. 2d 820 (C. C. A. 5); *Strang* v. *United States,* 45 F. 2d 1006 (C. C. A. 5). Failure to challenge a juror amounts to a waiver of any objection to him (*Queenan* v. *Oklahoma,* 190 U. S. 548), and an objection cannot be raised for the first time after verdict, even where the ground for challenge was not known when the jury was being impaneled (*Kohl* v. *Lehlback, supra; Hollingsworth* v.

Duane, supra; Raub v. *Carpenter,* 187 U. S. 159, 163–164; *Bush* v. *United States,* 16 F. 2d 709, 711 (C. C. A. 5); *Roush* v. *United States,* 47 F. 2d 444, 445 (C. C. A. 5); *United States* v. *Baker,* 3 Ben. D. C. 68 (S. D. N. Y.)), since there is an obligation to exercise due diligence in examining prospective jurors as to their qualifications. *Ippolito* v. *United States,* 108 F. 2d 668, 669 (C. C. A. 6); *Union Electric Light & Power Co.* v. *Snyder Estate Co.,* 65 F. 2d 297, 301 (C. C. A. 8); *Morse* v. *Montana Ore-Purchasing Co.,* 105 Fed. 337, 338 (C. C. D. Mont.); *United States* v. *662.44 Acres of Land, More or Less, supra.* See *Brewer* v. *Jacobs,* 22 Fed. 217, 241 (C. C. W. D. Tenn.), where, after an exhaustive review of the authorities, it is said:

> Nothing is better settled than that a party cannot, either with knowledge of a juror's disqualification or from supineness and culpable negligence in ascertaining whether he is qualified or not, speculate upon the result of a trial, holding in reserve whatever he may know or can afterwards ascertain to vitiate the verdict, if against him.

The applicability of the rule does not depend upon the nature of the objection raised to the particular juror. In *Kohl* v. *Lehlback, supra,* 160 U. S. at 301, the Court quoted with approval the following passage from *Wassum* v. *Feeney,* 121 Mass. 93, 94:

> When a party has had an opportunity to challenge, no disqualification of a juror entitles him to a new trial after verdict. This convenient and necessary rule has been applied by this court, not only to a juror disqualified by interest or relation, *Jeffries* v. *Randall*, 14 Mass. 205; *Woodward* v. *Dean*, 113 Mass. 297; but, even in a capital case, to a juror who was not of the county or vicinage, as required by the Constitution. * * *

In *Howard* v. *United States*, 26 F. 2d 551 (App. D. C.), a capital case, an objection to a juror because she was the wife of the deputy marshal was held too late when first raised on appeal. In *Paolucci* v. *United States*, 30 App. D. C. 217, certiorari denied, 208 U. S. 617, a first degree murder conviction, a new trial was sought on the ground that one of the jurors had expressed prejudice against all Italians and the defendant was Italian. The trial court's rejection of the challenge as untimely was upheld. The same principle was applied in *Orme* v. *Pratt*, 18 Fed. Cas. 820, No. 10,578 (C. C. D. C.), where it was alleged that one of the jurors was a brother-in-law of the plaintiff. In *Carruthers* v. *Reed*, 102 F. 2d 933, 938–939 (C. C. A. 8), certiorari denied, 307 U. S. 643, it was held that by not challenging the panel a defendant waived the right to object to the exclusion of Negroes from the jury. And in *Nelson* v. *United States*, 53 F. 2d 935 (App. D. C.), an objection to the jury

because women were permitted to sit was held too late when raised first on a motion for a new trial. Failure to challenge has also been held to constitute a waiver of an objection to jurors because of alleged employment by the Government. *Great Atl. & Pac. Tea Co. v. District of Columbia*, 89 F. 2d 502, certiorari denied, 301 U. S. 691. Cf. 1 Thompson, *Trials* (2d ed.) § 116, pp. 137–141.

Section 23–108 of the District of Columbia Code, 1940, specifically provides:

> No verdict shall be set aside for any cause which might be alleged as ground for challenge of a juror before the jury are sworn, except when the objection to the juror is that he had a bias against him, and such disqualification was not known to or suspected by the defendant or his counsel before the juror was sworn.

It has been held that this statute is merely declaratory of the common law, or, if anything, restricts, rather than extends, the discretionary power of courts to grant new trials. *Paolucci v. United States*, *supra*, 30 App. D. C. at 222. This provision clearly precludes petitioner's objection to juror Root, whose alleged disqualification was known before he was sworn. Any objection to Moore was forfeited by petitioner's failure to exercise reasonable diligence in examining him to ascertain any possible ground of disqualification.

We submit further, however, that neither Root nor Moore was subject to successful challenge for

cause. Moore and Root's wife were but two of many thousands of employees in the Treasury Department.[16] There is no suggestion that either had any relationship to the Bureau of Narcotics. Although the Secretary of the Treasury is by statute charged with enforcement of the Harrison Narcotic Acts (26 U. S. C. 2550–2564, 3220–3228), pursuant to Congressional authorization (26 U. S. C. 2606), he has delegated to the Commissioner of Narcotics "the investigation, detection and prevention of violations of the Federal narcotic and marihuana laws." 21 C. F. R., 1946 Supp., § 206.1. The Bureau of Narcotics is a statutorily created bureau within the Treasury Department (5 U. S. C. 282); it is subject only to the "general supervision and direction" of the Secretary of the Treasury (21 C. F. R., 1946 Supp., § 206.3) and its decisions are subject to review by the Secretary on formal appeal (5 U. S. C. 282c). That counsel for petitioner recognizes the separation of the functions of the various branches and bureaus within the Treasury Department is attested by the fact that after he learned that Root's wife worked in the Department, he proceeded to inquire further as to the particular part thereof she was employed in. When it was stated that she worked in the Office of the Secretary, counsel did not challenge Root.

[16] As of July 31, 1947, there were 87,362 employees in the Treasury Department. *Pay Structure of the Federal Civil Service*, *supra*, p. 20.

In *United States* v. *Wood*, *supra*, 299 U. S. at pp. 149–150, this Court expressly refrained from stating that employment in the branch of the government having jurisdiction over the subject matter of a particular case would *ipso facto* disqualify a person from serving on the jury. Specifically addressing itself to situations similar to that presented by Moore, the Court said:

> It is said that particular crimes might be of special interest to employees in certain governmental departments, as, for example, the crime of counterfeiting to employees of the treasury. But when we consider the range of offenses and the general run of criminal prosecutions, it is apparent that such cases of special interest would be exceptional. The law permits full inquiry as to actual bias in any such instances. We repeat, that we are not dealing with actual bias and, until the contrary appears, we must assume that the courts of the District, with power fully adequate to the occasion, will be most careful in those special instances, where circumstances suggest that any actual partiality may exist, to safeguard the just interests of the accused.

Moore's employment as a messenger in the Office of the Secretary of the Treasury, at the very most, suggests that "actual partiality *may* exist." Voir dire examination by petitioner's counsel could have established whether it did in fact exist or not. Petitioner cannot now complain of his failure to inquire into the facts. Cf. *Bratcher* v. *United*

States, 149 F. 2d 742, 745 (C. C. A. 4), certiorari denied, 325 U. S. 885. A *fortiori* he cannot object to Root because of the even more attenuated relationship to the prosecution, of which relationship he was aware when the jury was being impaneled.

CONCLUSION

The judgment below should be affirmed.

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Solicitor General.

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Attorneys.

OCTOBER 1948.

APPENDIX A

Jurors—Criminal Division No. Two, October 1946

1.	Thomas J. Barnes (35) (Govt.)	3524 Texas Ave., S. E.	G. P. O.—Bookbinder
2.	Edgar M. Clark (41)	4628 Windom Pl. N. W.	P. E. P. Co.—Clerk
3.	Mrs. Florence Humphrey Crawford (25) (Govt.)	1731 New Hampshire Ave. N. W. #304	Identification Specialist
4.	Mrs. Alberta S. Cryer (37) (Govt.)	4449 Ala. Ave. S. E.	G. P. O.—Typist
5.	William J. Curtin (61) (Govt.)	3338 Pea St. N. W.	Navy Dept.
6.	Louis H. Fisher (59)	1128 Col. Rd. N. W.	Salesman—Funeral Supplies
7.	Miss Margaret Fleetwood Gordon (25)	2905 Woodland Dr. N. W.	Unemployed
8.	Mrs. Florence Wm. Gorman (34) (Govt.)	4512 El. Ave. N. W.	Navy Dept.—Spvsr.
9.	Robert H. Hurd (50)	5046 New Hampshire Ave. N. W. #101	Receptionist Hub Furn. Co.
10.	James W. Jolliffee (57) (Govt.)	5040 New Hampshire Ave. N. W. #202	Int. Rev.—Clerk
11.	Miss Charlotte Esther Jones (26) (Govt.)	2013 Vermont Ave. N. W.	War Dept.—Typist
12.	James J. Lawlor (58) (Govt.)	1627 35th St. N. W.	Engr.—Fed. Pub. Hous.
13.	John G. Lazarus (32) (Govt.)	3919 R St. S. E. #1	R. F. C.—Accountant
14.	William T. Mack (47)	208 E St. S. W.	Engr.
15.	Mrs. Marjorie Ekholm Merrick (36)	Roger Smith Hotel	Housewife
16.	George M. Montgomery (63)	735 New Jer. Ave. NW.	Mechanic.
17.	Mrs. Catherine N. Moody (34)	1629 L St. N. E.	Housewife
18.	Alexander Moore (55) (Govt.)	317 47th St. N. E.	Treas.—Messenger
19.	William O. Parker (22)	1424 L St. S. E. #2	Pub. Radio Serv.
20.	Walter A. Robinson (45)	2370 Champlain St. N.W. #12	Gen. Elec. Ser. Dept.
21.	Joseph Rode (49)	302 Emerson St. N. W.	Gas Sta. Owner
22.	Benjamin Root (47) (Govt.)	1314 Upsher St. N. W.	War Dept.—Spvsr.
23.	Miss Mary Beatrice Staves (31) (Govt.)	1913 11th St. N. W.	Clk.—War Dept.
24.	Grover C. Sullivan (40)	916 8th St. N. E.	Chest. Farm Dairy
25.	Herman F. Stamps (49) (Govt.)	1219 Kenyon St. N. W.	P. O. Carrier
26.	Mrs. Mary Rice Willmer (40)	729 Gallatin St. N. W.	Hecht Co., Comptometer Optr.

APPENDIX B

List of Jurors in Case of United States v. Robert Frazier, Cr. No. 73,806

1. James E. Barr	2214 Kearny St. N. E.	Division Chief, Department of Agriculture.
2. William E. Brown	720 24th Street, N. E.	Clerk, Post Office Dept.
3. Miss Charlotte Esther Jones	2013 Vermont Ave. N. W.	War Dept.—Typist
4. Floyd F. Grayson	412 23rd Pl., N. E.	Mail carrier
5. James J. Lawlor	1627 35th St. N. W.	Engr.—Fed. Pub. Housing
6. John G. Bazarus	3919 R St., S. E. #1	R. F. C.—Accountant
7. Paul D. N. Leman	4604 New Hampshire Ave., N. W.	Machinist—Navy Yard
8. Margaret T. Lorenz	1332 Pa. Ave., S. E.	Clerk—A. A. F.
9. Alexander Moore	217 47th St., N. E.	Treas.—Messenger in Office of Secretary of Treas.
10. Benjamin Root	1314 Upshur St., N. W.	War Dept.—Spver.
11. Miss Mary Beatrice Staves	1913 11th St., N. W.	Clk.—War Dept.
12. Herman F. Stamps	1219 Kenyon St., N. W.	P. O Carrier